The Law Commission

Working Paper No 75

Classification of Limitation in Private International Law

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The Law Commission would be grateful for comments on this Working Paper before 31 October 1980.

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Classification of Limitation in Private International Law

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CLASSIFICATION OF LIMITATION IN PRIVATE INTERNATIONAL LAW

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THE LAW COMMISSION

WORKING PAPER NO. 75

CLASSIFICATION OF LIMITATION IN PRIVATE INTERNATIONAL LAW

PART I: INTRODUCTION

1. In September 1977 the twenty-first Report of the Law Reform Committee[1] (being their final report on Limitation of Actions) was published. The Committee proposed a variety of changes in the English law of limitations but recommended the retention of a system of limitation as opposed to the adoption of one of prescription.[2] They also concluded that there was a case for a re-examination of the English rule which classifies statutes of limitation as procedural, but felt themselves unable to make any positive recommendation on the subject on the ground that classification of statutes of limitation was an aspect of private international law and therefore outside their terms of reference.[3]

2. On 29 March 1979, the then Lord Chancellor, the Right Honourable Lord Elwyn-Jones, C.H., referred the question of classification of limitation of actions to the Law Commission under section 3(1)(e) of the Law Commissions Act 1965 in the

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1 (1977), Cmnd. 6923.

2 Most of their proposals have now been incorporated in the Limitation Amendment Bill which received its second reading in the House of Commons on 26 October 1979.

3 (1977), Cmnd. 6923, paras. 2.93 and 2.96. In 1936 the Law Revision Committee in para. 24 of their Fifth Interim Report (Statutes of Limitation), Cmd. 5334, reached a similar conclusion; namely that no general case could be made in favour of extinguishing the plaintiff's right at the expiration of a period of limitation, but that the question of the classification of statutes of limitation in private international law should receive separate consideration. No action seems to have been taken on this latter suggestion.

following terms:

> "to consider what changes, if any, are desirable in the classification of limitation of actions in private international law, and to make recommendations".

3. In producing this Working Paper we have adopted the following scheme. In Part II we examine the current state of the English law regarding the classification of statutes of limitation in private international law. In Part III we look at some of the criticisms which have been levelled at the existing law, and in Part IV we consider how limitation of actions is classified under the rules of private international law in other jurisdictions. In Part V we first examine some of the policy issues which we think are involved in deciding whether this country ought to adopt a different approach to the classification of limitation. We then go on to outline the field of choice for a change in English law. In Part VI we make our provisional recommendations. In Part VII we examine some of the indirect effects that the changes which we recommend might involve, and in Part VIII we summarise the provisional recommendations made in this paper. We are conscious of the fact that the exhaustive nature of this approach might be thought by some to have resulted in a rather long paper. However we are aware that many of those to whom our proposals are likely to be of most concern will not be specialists in private international law, and we believe that it is more desirable to make a complicated and technical subject comprehensible to non-specialists than to limit the length of the paper.

PART II: THE EXISTING LAW AND ITS JUSTIFICATION

Introduction

4. For the purposes of private international law, matters are classified by the English courts as pertaining either to substance or to procedure. The usual way of drawing this distinction is by reference to the difference between right and remedy; those matters which relate to a party's rights are classified as substantive while those relating to his remedy are classified as procedural. The distinction is of cardinal importance because matters classified by the forum as procedural are governed by the domestic law of the country in which proceedings are instituted, i.e. by the lex fori, whereas matters classified by that law as substantive are governed by the law to which the court is directed by its choice of law rules, i.e. the lex causae. It is in this sense, namely as a method of classification which enables a court to ascertain the correctly applicable law in a private international law case, that we generally use the terms "substance" and "procedure" in this paper.[4]

The general rule

5. English law acknowledges two ways in which a plaintiff's right to bring an action may be limited by the running of time: prescription, by virtue of which the plaintiff's title is extinguished when the relevant period

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4 Where the context requires another meaning to be attached to these words, we specifically say so.

expires, and limitation whereby lapse of time renders the plaintiff's right unenforceable by action but leaves the right itself intact.[5] For the purposes of English private international law the courts have classified rules falling into the former category (i.e. prescription) as matters of substance and those falling into the latter category (i.e. limitation) as matters of procedure.[6]

6. In a case involving a foreign element the English court will be required to classify both its own domestic statute of limitation and the corresponding provision of the lex causae in order to determine the applicable period of limitation. As far as English statutes of limitation are concerned, subject to the exceptions mentioned in paragraph 8 below, the courts have generally accorded them a procedural classification with the result that, in accordance with the principle outlined in paragraph 4 above, they are considered to be applicable even to a case governed by a foreign substantive law.[7] At the same time their approach toward a foreign statute of limitation has usually been to ignore[8] any

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5 For the purposes of the paragraphs that follow we have referred to time bars generally as either statutes or periods of limitation. Where the context calls for a particular distinction to be drawn between prescription and limitation (as defined above), we have said so. The effect of most English time bars is merely to deny the plaintiff a right of action after a certain period has elapsed i.e. limitation. Exceptionally, however, in actions involving conversion or title to land, the effect of the expiry of the relevant period of time is actually to extinguish the plaintiff's title; Limitation Act 1939, ss.3 and 16.

6 Huber v. Steiner (1835) 2 Bing. N.C. 202; 132 E.R. 80; Harris v. Quine (1869) L.R. 4 Q.B. 653; Re Low [1894] 1 Ch. 147; Société Anonyme Metallurgique de Prayon, Trooz, Belgium v. Koppel (1933) 77 S.J. 800; Black-Clawson International Ltd. v. Papierwerke Waldhoff-Aschaffenburg A.G. [1975] A.C. 591.

7 Williams v. Jones (1811) 13 East 439; 104 E.R. 441; Harris v. Quine (1869) L.R. 4 Q.B. 653, 658; Black-Clawson International Ltd. v. Papierwerke Waldhoff-Aschaffenburg A.G. [1975] A.C. 591, 630 per Lord Wilberforce.

8 Black-Clawson International Ltd. v. Papierwerke Waldhoff-Aschaffenburg A.G. [1975] A.C. 591.

classification made by the court of the relevant foreign country. Instead the English courts have applied to a relevant foreign statute the English test of whether the plaintiff's right is extinguished or his remedy merely barred. In most cases this has led to a foreign statute of limitation being regarded by the English courts as procedural[9] and thus inapplicable to a case otherwise governed by foreign law.

"The English rule"

7. It is therefore possible to summarise the present English approach to the classification of statutes of limitation in private international law by saying that the English courts generally regard statutes of limitation as matters of procedure to be governed by English law as the lex fori. In so doing they have tended to ignore any classification accorded by a foreign court to its own statute of limitation. For convenient reference in the paragraphs that follow we have called this approach "the English rule".[10]

Exceptions

8. The leading authorities on private international law[11] suggest that there are a limited number of exceptions to the English rule, but there does not seem to be any English authority directly in point. In the following cases it is thought that English law would regard a statute of limitation as substantive, with the result that the lex causae would supply the appropriate period.[12]

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9 Huber v. Steiner (1835) 2 Bing. N.C. 202; 132 E.R. 80; Société Anonyme Metallurgique de Prayon, Trooz, Belgium v. Koppel (1933) 77 S.J. 800.

10 The rule is not exclusive to England. As will be seen below it is shared by a number of other common law jurisdictions.

11 E.g. Dicey and Morris, The Conflict of Laws, 9th ed., (1973), p.1104; Cheshire and North, Private International Law, 10th ed., (1979), p.697.

12 See also para.27, below.

(a) Where a statute prescribes that ownership should be acquired by adverse possession, for instance section 16 of the Limitation Act 1939 or a foreign provision analogous thereto.

(b) Where a statute expressly extinguishes the former owner's title, for instance section 3 of the Limitation Act 1939 or a foreign provision analogous thereto.

(c) Where a statute creates a new right and at the same time specifies that such right shall only continue for a limited period. This might be exemplified by the law relating to fatal accidents. The Fatal Accidents Act 1846 provided a new right of action to the dependents of those killed as the result of another's tort and fixed a special limitation period of twelve months[13] for such claims even though, at that time, the limitation period for most claims in both tort and contract was six years.[14] There are both Scottish[15] and American[16] decisions which support the classification of such a provision as substantive, and furthermore there is American authority to the effect that such a classification can be sustained even though the special period of limitation appears in a different statute from that which confers the right.[17] However,

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13 1846 Act, s.3. The period is now three years: Limitation Act 1939, s.2B. This is the same period as for personal injury claims generally: see the 1939 Act, s.2A.

14 Limitation Act 1623, s.3, now repealed by Limitation Act 1939, s.34 and Schedule.

15 M'Elroy v. M'Allister 1949 S.C. 110.

16 The Harrisburg (1886) 119 U.S. 199.

17 Davis v. Mills (1904) 194 U.S. 451.

the scope of this exception is unclear.[18] Moreover it would also appear to be uncertain whether or not the special period of limitation provided in the statute creating the new right must be shorter than the general period of limitation of the lex causae in order that the special limitation rule be classified as substantive by the lex fori.[19]

Examples

9. The following examples illustrate how the English rule operates in practice and are intended to indicate some of the more obvious difficulties that might arise.[20] For the purposes of each example it is assumed that English law is the lex fori and French law is the lex causae.

(a) The English court classifies both the English and the French statutes of limitation as procedural. English law as the lex fori will prevail. In the light of the general attitude of the English courts[21] towards the classification of statutes of limitation this is the most likely situation to occur, but it has the following effects:

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18 See, for instance Leflar, American Conflicts Law, 3rd ed., (1977), pp.254-5, which cites conflicting American authorities as to whether a shorter statutory period under the law of the forum might still bar an action on a foreign statutory right where the special period of the lex causae is still running. See also Goodrich, Handbook of the Conflict of Laws, 4th ed., (1964), pp.154-5.

19 Dicey and Morris, The Conflict of Laws, 9th ed., (1973), p.1104, suggests that the special period must be shorter than that applicable generally under the lex causae though there is no direct authority for this suggestion.

20 It should be pointed out that the difficulties which we indicate in this paragraph are more pertinent to contractual actions than to claims in tort. See further para.10, below.

21 See paras.5-7, above.

(i) If the English limitation period has expired, the plaintiff's claim will fail, even though it is not yet barred by French law.[22]

(ii) If the English limitation period has not expired, the plaintiff will succeed even though his claim is already barred in France.[23]

(b) The English court classifies its own statute of limitation as procedural but the corresponding French statute as substantive. In this case both statutes would appear to be applicable. Two results are possible according to which limitation period is the longer:

(i) If the English period is still running, but the French period has already elapsed, an English court will not entertain the claim on the ground that the plaintiff no longer has a right to enforce.[24]

(ii) If the English period has expired, but the French period is still running, it has been suggested,[25] on the basis of dicta in

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22 Don v. Lippmann (1837) 5 Cl. and Fin. 1, (H.L.); 7 E.R. 303.

23 Huber v. Steiner (1835) 2 Bing. N.C. 202; 132 E.R. 80; Harris v. Quine (1869) L.R. 4 Q.B. 653; Société Anonyme Metallurgique de Prayon, Trooz, Belgium v. Koppel (1933) 77 S.J. 800.

24 Huber v. Steiner (1835) 2 Bing. N.C. 202, 210-211; 132 E.R. 80, 83; Harris v. Quine (1869) L.R. 4 Q.B. 653, 658, per Blackburn J.

25 Dicey and Morris, The Conflict of Laws, 9th ed., (1973), p.1105.

British Linen Co. v. Drummond,[26] that the English court would still not entertain the claim but on the ground (this time) that the remedy is barred under English law which, as the lex fori, governs procedure.[27]

(c) The English court classifies both the English and the French statutes of limitation as substantive. There does not appear to be any reported English case where this has in fact happened. However the English rule would seem to lead to the result that a claim would fail if the French period of limitation had expired because the plaintiff would have no right left to enforce.[28] On the other hand if it was the English period which had expired it is arguable that the claim would be unaffected.

(d) The English court classifies its own statute of limitation as substantive but the corresponding French statute as procedural

Again there is no English authority in point. However on a strict interpretation of the English rules of classification neither the English nor French period of limitation would be applied. The English statute is classified

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26 (1830) 10 B. and C. 903; 109 E.R. 683.

27 But see American Law Institute Restatement of the Law (Second) Conflict of Laws (1971), Vol.1, Ch.6, para.143; see also Theroux v. Northern Pacific R. Co. (1894) 64 Fed. 84 for a contrary view by virtue of which the longer period of the lex causae was applied. However there does not appear to be complete agreement in the United States on this point; see Wurfel, "Statutes of Limitation in the Conflict of Laws", (1974) 52 North Carolina L.Rev. 489.

28 By analogy with dicta in Huber v. Steiner (1835) 2 Bing. N.C. 202, 210-211; 132 E.R. 80, 83; Harris v. Quine (1869) L.R. 4 Q.B. 653, 658. See also Dicey and Morris, The Conflict of Laws, 9th ed., (1973), p.1105.

> as substantive, and is thus inapplicable because English law is not the lex causae; the French statute is procedural and so inapplicable in an English forum. Consequently no limitation period applies to the claim, even though it is barred by the internal laws of both England and France. Although in practice it might be expected that an English court would avoid this conclusion on grounds of public policy, the theoretical position is that the action remains perpetually enforceable.[29]

10. As we indicated earlier[30] the difficulties outlined in the previous paragraph arise largely in the context of contractual claims. They are likely to be less common in tort cases because of the nature of the present English rule for choice of law in tort. A tort committed abroad will only be actionable in England if it is both civilly actionable under the law of the country where it was committed (the lex loci delicti) and also actionable under the English law of tort.[31] Exceptionally, however, the court may dispense with

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29 This result was once reached in a decision of the German Supreme Court: R.G. (4 Jan. 1882) 7 R.G.Z. 21. However more recent decisions in Germany have refused to follow this authority, see for instance: R.G. (21 Nov. 1910) 1911 J.W. 148; R.G. (6 July 1934) 145 R.G.Z. 121; B.G.H. (9 June 1960) 1960 W.M. 938; L.G. Bremen (10 May 1961) 1960/61 I.P. Rspr, no. 50. See also: Rabel, The Conflict of Laws, 2nd ed., (1964), Vol. III, pp.532-533, n.122-125. Academic authorities on both sides of the Atlantic have suggested a number of ways of escaping from the dilemma. See, for instance: Beckett, "The question of classification in private international law", (1934) 15 B.Y.B.I.L. 46, 76-77; Cook, Logical and Legal Bases of the Conflict of Laws (1942), pp.219, et seq.; Falconbridge, Essays on the Conflict of Laws, 2nd ed., (1954), pp.292-295.

30 See para.9, n.20.

31 Phillips v. Eyre (1870) L.R. 6 Q.B.1; Boys v. Chaplin [1971] A.C. 356.

the application of one or other of the limbs of this rule.[32] If a limitation point arises in a normal tort case, to which both parts of the rule are applied, the various possible conflicts between the lex fori and the lex causae, outlined in paragraph 9 above, will not arise except in one unusual case. This is because the English statute will be applicable in all cases, whether English law is regarded as the lex fori[33] or as one of the two leges causae under the choice of law rule. However there is one rare case where the limitation provision of the lex loci will also be relevant and applicable. This is where the statute of limitation of the lex loci delicti is both characterised by the English court as providing a substantive defence[34] and is also shorter than the corresponding English period, thus making it worth the defendant's while to rely on it. Turning finally to the exceptional case where one or other limb of the choice of law rule is dispensed with in a tort case involving a limitation point, the position is as follows. If, as in Boys v. Chaplin,[35] the lex loci delicti is not applied and only English law is applied, there will be no problem with the classification of statutes of limitation because English law will be both the lex fori and the lex causae. On the other hand, if only the lex loci delicti is applied, the same difficulties as are encountered in cases of contract[36] will arise.

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32 Boys v. Chaplin [1971] A.C. 356.

33 Allard v. Charbonneau [1953] 2 D.L.R. 442.

34 M'Elroy v. M'Allister 1949 S.C. 110.

35 [1971] A.C. 356.

36 Described in para.9, above.

Justification of the English rule

11. The English rule has developed into its present form for a number of reasons, some of them jurisprudential, others practical. At the heart of its development lies the distinction, mentioned in paragraph 4 above, between right and remedy. The relevance of this distinction to the classification of limitation is summed up by a passage from the judgment of Tindal C.J. in Huber v. Steiner:[37]

> "The distinction between that part of the law of the foreign country where a personal contract is made, which is adopted, and that which is not adopted by our English courts of law, is well known and established; namely, that so much of the law as affects the rights and merit of the contract, all that relates 'ad litis decisionem,' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates 'ad litis ordinationem,' is taken from the 'lex fori' of that country where the action is brought; and that in the interpretation of this rule, the time of limitation of the action falls within the latter division, and is governed by the law of the country where the action is brought, and not by the lex loci contractus, is evident from many authorities."

With the subsequent development of private international law this distinction between right and remedy for the purpose of defining the applicable law has been identified with, and subsumed under, the modern classification of matters as substantive or procedural.

12. There are also a number of practical justifications of the English rule. It has been said that it is the most convenient solution from the point of view of the court hearing the matter;[38] it is simple and certain to apply when

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37 (1835) 2 Bing. N.C. 202, 210-211; 132 E.R. 80, 83.

38 Don v. Lippmann (1837) 5 Cl. and Fin. 1, 14-15 (H.L.); 7 E.R. 303, 308 per Lord Brougham.

compared with other practices;[39] it ensures that a debtor is protected from stale claims;[40] and that, in so far as a country's limitation periods are taken into account when its other procedural rules are formulated, it is more appropriate to apply the limitation statute of the lex fori than that of any other country.[41] It has also been suggested that English periods of limitation reflect English notions of public policy in so far as they fix the maximum period of time in which it is supposed that justice can be done in the English courts,[42] and they ensure the equal treatment of litigants before an English court. We return to this question of public policy in paragraphs 21 and 36 below.

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39 Ailes, "Limitation of Actions and the Conflict of Laws", (1933) 31 Mich.L.Rev. 474, 497-8.

40 Ibid., p.500.

41 See Law Reform Commission of British Columbia, Report on Limitations: Part 2, (1974) p.98, n.15.

42 See also paras.27 and 48-49, below.

PART III: CRITICISMS OF THE EXISTING LAW

Introduction

13. The English rule which we have outlined above has been widely criticised in those jurisdictions which still adhere to it, or which adhere to it in a modified form.[43] In this Part we shall outline some of the main reasons for this dissatisfaction.

Based on an unreal distinction

14. We have indicated above[44] that the English rule owes its theoretical origins to the traditional distinction drawn by English courts between right and remedy. However, it is arguable that this distinction is an unreal one.[45] A right cannot be said to have an objective existence independent of

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43 E.g. in Canada see: Falconbridge, Essays on the Conflict of Laws, 2nd ed., (1954), Ch.12; Castel, Canadian Conflict of Laws (1975), Vol.I, pp.608-15.

In the United States see, for example, Leflar, American Conflicts Law, 3rd ed., (1977), pp.252-9; Lorenzen, Selected Articles on the Conflict of Laws (1947), Ch.12; Goodrich, Handbook of the Conflict of Laws, 4th ed., (1964), pp.152-6; Rabel, The Conflict of Laws, 2nd ed., (1964), Vol.III, Chs.52 and 53; see also the articles mentioned in n.79, below.

In Australia see: Nygh, Conflict of Laws in Australia, 3rd ed., (1976), pp.178-9; Sykes and Pryles, Australian Private International Law (1979), pp.130-131.

In England see: Dicey and Morris, The Conflict of Laws, 9th ed., (1973), pp.1103-6; Cheshire and North, Private International Law, 10th ed., (1979), pp.695-8; Graveson, Conflict of Laws, 7th ed., (1974), pp.595-6; Wolff, Private International Law, 2nd ed., (1950), pp.232-3; Beckett, "The question of classification in private international law", (1934) 15 B.Y.B.I.L. 46.

44 See paras.4 and 11, above.

45 Cheshire and North, Private International Law, 10th ed., (1979), p.693; Falconbridge, Essays on the Conflict of Laws, 2nd ed., (1954), p.284; Beckett, "The question of classification in private international law", (1934) 15 B.Y.B.I.L. 46, 68-9.

the remedy which supports it.[46] Indeed, as one writer has observed, "a right for which the legal remedy is barred is not much of a right."[47] It would seem to follow that any classification based on this artificial distinction must itself be unreal.

15. However we think that the artificial nature of a procedural classification of limitation for the purposes of private international law is apparent even if one accepts the traditional contrast between right and remedy. The effect of the expiry of a period of strict limitation[48] is to destroy the plaintiff's right of action at the option of the defendant. For all practical purposes this leaves the plaintiff with no right at all. This is now underlined by Clause 6 of the Limitation Amendment Bill currently before Parliament which provides that, once a right of action has become barred by any of the provisions of the Limitation Act 1939, it shall not be capable of revival.[49]

Contrary to the principles of private international law

16. The examples given in paragraph 9 above serve to illustrate how the English rule might, under certain circumstances, operate to bar a claim which is still alive in the jurisdiction in which it arose, or to allow a claim already barred by the lex causae. It is generally acknowledged that English private international law "exists to fulfil foreign rights, not to destroy them .... It is a stultification of private international law to refuse recognition to a foreign

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46 See Rabel, The Conflict of Laws, 2nd ed., (1964), Vol.III, pp.490-3, where he argues that the contention that limitation destroys only the plaintiff's remedy is partly the result of linguistic confusion in the development of the term 'action'.

47 Leflar, American Conflicts Law, 3rd ed., (1977), p.253.

48 As opposed to prescription. See para.5, above.

49 See also the 21st Report of the Law Reform Committee (1977), Cmnd. 6923, para.2.71.

right substantively valid under its lex causae, unless its recognition will conflict with some rule of public policy so insistent as to override all other considerations".[50] On this basis an English court will, in a case involving a foreign element, give effect to the relevant foreign law in deciding both whether a particular right has been created and as to its extent. It therefore seems to us anomalous that the relevant foreign law should not also determine the question of whether a party's right has been effectively extinguished.

Unjust to debtors

17. It is universally admitted[51] that, amongst the objects of limitation statutes generally, are both the need to protect defendants from stale claims relating to long past incidents about which witnesses have no accurate recollection, and also the need to ensure that after a given time a person may treat as finally closed an incident which may have led to a claim against him. However the English rule which classifies statutes of limitation as procedural for the purposes of private international law can operate to frustrate these aims and work injustice to the defendant. Although it is difficult to justify a position where both debtor and creditor must have regard not only to the law which governs the substance of their obligation, but also to the laws of any other country which might, on however exorbitant a ground, assume jurisdiction over a possible claim, the English rule may mean just this. In Germany, for instance, for the purposes of a case tried under German law, a debtor's liability is statute-barred after two years. However,

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50 Cheshire and North, Private International Law, 10th ed., (1979), p.692. See also Dicey and Morris, The Conflict of Laws, 9th ed., (1973), p.1101.

51 See for example the Report of the Committee on Limitation of Actions in Cases of Personal Injury (1962), Cmnd. 1829, para.17.

(assuming that the plaintiff can establish that the English courts have jurisdiction) for the following four years such a debtor risks the possibility of an action in England in which he would be at an unfair disadvantage if he had, relying on the German period of only two years, allowed his records later to be destroyed.

18. It has also been argued[52] that a debtor under a contract whose proper law is English might, as a result of the operation of the English rule, run the risk of being prejudiced in an action abroad. This, it is said, might arise if a foreign court both accepts the procedural classification generally accorded by the English courts to English statutes of limitation, and (along with most civil law jurisdictions) treats its own statute as a matter of substance, with the result that technically no limitation period is applicable and the hypothetical debtor is exposed to a possible suit without time limit.[53] Although we appreciate the theoretical logic of this particular argument, we are of the opinion that it is probably of less practical importance than the more general criticism outlined in paragraph 17 above. This is because many civil law jurisdictions do in fact ignore the English courts' procedural classification of English statutes of limitation and either treat such statutes as substantive or as both substantive and procedural.[54]

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52 Reform of the Law relating to Prescription and Limitation of Actions (1970), Scot. Law Com. No. 13, para.87(3).

53 See also para.9(d), above.

54 See, for example, two German decisions concerning English promissory notes where the German court found that limitation of actions, although differently characterised in German and English law, had the same effect in practice under both systems, and thus the English statute of limitations was held to be applicable where English law was otherwise the lex causae: R.G. (21 Nov. 1910) 1911 J.W. 148; R.G. (6 July 1934) 145 R.G.Z. 121. See also Anton, Private International Law (1967), p.227, n.33; Nussbaum, Principles of Private International Law (1943), pp.83-4.

Encouragement of "forum shopping"

19. Because the English rule can operate to allow a claim which is barred under the law of the country where it arose,[55] it may encourage a tardy plaintiff to make his claim in this country, providing of course that he can satisfy the English rules as to jurisdiction.

No significant practical advantages

20. Advocates of the English rule[56] have stressed both its convenience and simplicity. We are not impressed by such arguments. As regards convenience we do not think that it is any more difficult to apply the limitation provisions of the lex causae than it is to apply any of the rest of the substantive law governing the case. Moreover we think that it is highly questionable whether the actual application of the English rule is necessarily simple. It involves reference being made to two possibly quite different legal systems, coupled with the incongruity of plaintiff and defendant establishing their claim and defence respectively on the basis of two separate sets of laws. Furthermore it is possible to envisage complex situations under the present rule where either English law (as the lex fori) and foreign law are both applicable,[57] or where neither law is applicable.[58]

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55 See para.9(a)(ii), above.

56 Don v. Lippmann (1837) 5 Cl. and Fin. 1, 14, (H.L.); 7 E.R. 303, 308 per Lord Brougham; Ailes, "Limitation of Actions and the Conflict of Laws", (1933) 31 Mich. L. Rev. 474, 497-8.

57 Because the court classifies the English statute as procedural, but the foreign statute as substantive: see para.9(b), above.

58 Because the English statute is classified as substantive, but the foreign statute as procedural: see para.9(d), above.

21. There are likewise a number of arguments which indicate that the public policy of the forum cannot satisfactorily justify adherence to the English rule. Whilst resort to the limitation provisions of the forum might be supported on the grounds of public policy in very exceptional circumstances (for instance where the lex causae provides no period of limitation at all, or alternatively an exceptionally short one), in most cases the difference between different countries' periods of limitation is merely a matter of a year or two.[59] On the assumption that the selection of any period connotes some degree of arbitrariness, there seems to be little cause for fearing that the application of a foreign statute in preference to the domestic statute will necessarily infringe some vital aspect of public policy. Moreover it is a generally accepted feature of statutes of limitation that the court will take notice of a completed period only if the defendant actually avails himself of the bar.[60] This alone makes it difficult to believe that "the state claims a paramount interest in avoiding stale claims so as to insist on the application of its own statute of limitation".[61] Finally, it seems questionable whether a rule, which might operate in effect to revive a right which can no longer be enforced in the country in which it arose, is really serving English public policy.

Special limitation periods

22. Our attention has also been drawn, by a memorandum placed before the Law Reform Committee[62] by Dr. F.A. Mann, to a problem which, although it appears not yet to have

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59 See for instance Green, Statutes of Limitation in the Commonwealth (1967). See also Rabel, The Conflict of Laws, 2nd ed., (1964), Vol.III, p.529; C.G.J. Morse, Torts in Private International Law (1978), p.186-7.

60 Rabel, The Conflict of Laws, 2nd ed., (1964), Vol.III, pp.495-6, 525-9.

61 Ibid., pp.495-6.

62 See (1977) Cmnd. 6923, para.2.93.

troubled the courts, seems to raise formidable technical difficulties. The problem arises where the English statute of limitation applies as the lex fori but the foreign fact situation is such that, had the case been a purely English one, a special limitation rule would have been applied. This might be exemplified by one of the special rules under the Limitation Act 1939. No limitation period runs in respect of a claim by a beneficiary to recover trust property in the possession of a trustee.[63] How is this to be applied in the case of an action governed by a foreign lex causae, under which law the concept of trust is unknown, if the English lex fori would treat the parties as trustee and beneficiary? In cases such as this, where special limitation rules are provided under English law based on categories of action or criteria unknown to, or different from, those in the lex causae, we agree with Dr. Mann that even greater conceptual difficulties are raised than with the application of the general English periods.

Conclusion

23. On the basis of the criticisms of the English rule which we have outlined above, we believe that there is a strong case for its reform. Moreover this need for reform is likely to become even more pressing in the future. Negotiation of a draft E.E.C. Convention, whose aim is to provide uniform rules throughout the E.E.C. for determining the law applicable to contractual obligations, is nearing completion.[64] The main provisions of this Convention permit

63 Limitation Act 1939, s.19(1)(b).

64 A text embodying the results of the work of the experts from Member States has now been submitted to governments and has been issued for consultation in this country: Private International Law: Text of a draft E.E.C. Convention on the Law Applicable to Contractual Obligations, H.M.S.O. 1979.

the parties to a contract to choose the applicable law,[65] but, in default of such choice, the Convention provides that the contract will be governed by the law of the country with which it is most closely connected.[66] Most significantly for our present purposes, the Convention specifically states that the ambit of these choice of law rules shall include "the various ways of extinguishing obligations, and prescription and limitation of actions."[67] If the United Kingdom accedes to the Convention as presently drafted, it will wholly replace our present contractual choice of law rules. This would mean that, so far as contractual matters are concerned, questions of limitation would be referred by an English court to the appropriate lex causae as determined by the Convention. English law would no longer automatically be applied as the lex fori. However, all non-contractual claims would continue to be governed by the present English rule with the consequence that different private international law rules relating to limitation would apply depending on whether or not the claim fell within the E.E.C. Convention. In our view, it would be most unsatisfactory and confusing to have a set of rules under which the classification of limitation provisions depended, for example, on whether the claim was based in contract or tort.

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65 Art. 3.

66 Art. 4.

67 Art. 10(1)(d).

PART IV: CLASSIFICATION OF LIMITATION IN OTHER JURISDICTIONS

Introduction

24. Broadly speaking the English rule, which we have described in Part II of this paper,[68] has been confined in modern times to common law jurisdictions[69] (for instance to Australia, Canada and the United States) and to Scotland. In this Part we first examine the attitude toward classification of statutes of limitation adopted in civil law jurisdictions.[70] We then go on to look at the developments that have taken place in recent years in some common law jurisdictions, involving either the adoption of the "civil law approach", or the devising of a "hybrid" arrangement which falls somewhere between the "civil law approach" and the traditional English rule.[71]

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68 And defined in para.7, above.

69 See, for instance:

Australia: Pederson v. Young (1964) 110 C.L.R. 162; Subbotovsky v. Waung [1968] 3 N.S.W.R. 261, but note the special position of New South Wales since 1969 - see para.29(a), below.

Canada: Rutledge v. U.S. Savings and Loan Co. (1906) 37 S.C.R. 546; Quaker Oats Co. v. Denis (1915) 8 W.W.R. 877; 24 D.L.R. 226; Bowes and Co. v. American Ry. Express Co. (1924) 26 O.W.N. 290.

United States: McElmoyle v. Cohen (1839) 38 U.S. (13 Pet.) 312; American Law Institute, Restatement of the Law (Second) Conflict of Laws, (1971), Vol.I, Ch.6, paras.142-3. For a catalogue of American authorities adhering to the English rule see Ailes, "Limitation of Actions and the Conflict of Laws", (1933) 31 Mich.L.Rev. 474, 487, n.77-78, and Leflar, American Conflicts Law, 3rd ed., (1977), p.252, n.1 and 3.

70 See paras.25 and 26, below.

71 See paras.27-30, below.

The civil law rule: application of the period prescribed by the lex causae

25. In complete contrast to the English rule, civil law jurisdictions treat statutes of limitation as matters of substance for the purposes of private international law.[72] Accordingly they determine questions of limitation in cases having a foreign element by reference to the same law as that which governs all the other substantive issues of the claim (the lex causae). It is instructive that one of the reasons for this contrast with the English rule is that civil law jurisdictions do not adopt a rigid distinction between right and remedy as the criterion for distinguishing between substance and procedure in private international law. Indeed, in West Germany, for instance, paragraph 222 of the Civil Code, dealing with the effect of prescription, is treated by the German courts as substantive even though a sum of money paid after the period of prescription has expired cannot be recovered. Consequently the principal conceptual argument which led the English courts to classify periods of limitation as procedural in such cases as Huber v. Steiner[73] does not exist in many civil law jurisdictions.

26. On the other hand it would be wrong to suggest that the pattern of the application of the statute of limitation of the lex causae in civil law jurisdictions is entirely uniform. In particular, different countries have adopted differing attitudes where the period of limitation applicable under the lex causae is significantly longer than the

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72 For a summary of those countries which adhere to the civil law rule, see Rabel, The Conflict of Laws, 2nd ed., (1964), Vol.III, p.512, n.30. See also Batiffol, Droit International Privé, 6th ed., (1974-6) para.615; Raape, Internationales Privatrecht, 5th ed., (1961), pp.498-502; Kegel, Internationales Privatrecht; ein Studienbuch; 4th ed., (1977), pp.284-285.

73 (1835) 2 Bing. N.C. 202; 132 E.R. 80.

corresponding period in the forum. For example, in one Austrian case[74] the Austrian court applied the Italian five-year period instead of their own three-year period where the parties were both Austrian but where Italian law was the lex causae. In contrast, however, Article 12 of the Introductory Law of the West German Civil Code[75] will often allow the defendant in cases of tort to rely on whichever is the shorter of the periods of limitation adopted by the lex fori and the lex causae.[76]

Compromise solutions

27. Whilst a number of common law jurisdictions[77] might be prepared to mitigate the severity of the English rule by adopting exceptions similar to those discussed in relation to our own law,[78] a more significant inroad into the general common law rule has been the adoption in most American states of so-called "borrowing statutes."[79] These statutes

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74 Oberster Gerichtshof 1.4. 1960, Jur. Bl., 1960, p.553, Clunet 1962, 751.

75 E.G.B.G.B., Art.12.

76 Compare the policy underlying "borrowing statutes", para.27, below.

77 See for example: United States: The Harrisburg (1886) 119 U.S. 199; Davis v. Mills (1904) 194 U.S. 451. See also Leflar, American Conflicts Law, 3rd ed., (1977), pp.254-5.

Australia: Pederson v. Young (1964) 110 C.L.R. 162, 166, 167. See also Nygh, Conflict of Laws in Australia, 3rd ed., (1976), p.179.

Canada: Falconbridge, Essays on the Conflict of Laws, 2nd ed., (1954), p.295.

78 See para.8, above.

79 On "borrowing statutes" see generally: Leflar, American Conflicts Law, 3rd ed., (1977), pp.256-8; Goodrich, Handbook of the Conflict of Laws, 4th ed., (1964), pp.153-4; Rabel, The Conflict of Laws, 2nd ed., (1964), Vol.III, pp.521-4; Ehrenzweig, A treatise on the Conflict of Laws (1962), pp.430-431; Ester, "Borrowing Statutes of Limitation and the Conflict of Laws", (1962) 15 U. of Fla.L.Rev. 33; Vernon, "Statutes of Limitation in the Conflict of Laws", (1960) 32 Rocky Mt.L.Rev. 287; R.M.Z., "Statutes of Limitation: lex loci or lex fori", (1961) 47 Virginia L.Rev. 299.

differ greatly as to their precise terms. Generally speaking however, they operate so as to bar an action in the forum if it is already barred by the corresponding statute of the place where the cause of action arose, or alternatively by the place where the defendant, or both parties, resided. Whilst in some cases "borrowing statutes" operate to borrow the whole of another state's law on limitations, including any provisions which that state might have to stop time running, they are only a partial solution to the problem in that they only apply when the foreign state's period has run but that of the forum has not. This means that if a claim is barred by the lex fori but not by the law of the place where it arose, the forum's "borrowing statute" will have no application. Consequently the forum will still apply its own statute of limitation to bar the claim.[80]

Recent developments

28. More recently a number of common law jurisdictions have advocated, and some have adopted,[81] a less cautious approach than that found in the compromises described above. In contrast to the limited review of the law as to classification which we are conducting, such an approach has generally been the result of an overall review of the limitations law of their jurisdictions, which has in turn entailed the adoption of a general system of prescription. Because the adoption in these countries of a prescriptive régime has not been accompanied by any specific alteration in the traditional rules of classification (which distinguish between substance and procedure by reference to right and remedy) the change to prescription has, in private

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80 For further consideration of the merits of "borrowing statutes" generally, see paras.48 and 49, below.

81 See para.29, below.

international law terms, led in effect to the reclassification in these countries of their domestic statutes of limitation as substantive on the basis that they now bar the plaintiff's right and not merely his remedy. As matters of substance they will consequently only apply where the law of which they form a part is also the lex causae.

29. The following countries have been the main areas of development:

(a) Australia: New South Wales

The Law Reform Commission of New South Wales recommended in 1967[82] that on the expiry of the New South Wales period of limitation a plaintiff's right should be extinguished, and suggested that this should have a dual effect in a case involving private international law. In the first place, where New South Wales law was held by a foreign court to be the lex causae, the New South Wales limitation statute would be applicable because it affected the plaintiff's right or title. However, where New South Wales law was merely the lex fori, the Commission recommended that the New South Wales limitation period should continue to apply so as to bar an action brought under the laws of another country. This dual approach is now reflected in sections 14 and 63 to 68 of the New South Wales Limitation Act 1969. We return to this provision in paragraphs 53 and 54 below.

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82 First Report on the Limitation of Actions (1967), para.321.

(b) Canada[83]

(i) Ontario

In 1969 the Ontario Law Reform Commission[84] proposed that the effect of the expiry of periods of limitation should be to extinguish the plaintiff's right and that the proposed new statute ought to state specifically that statutes of limitation, whether domestic or foreign, should be classified by the Ontario courts as substantive for the purposes of private international law, with the result that the statute of limitation of the lex causae would always apply. This proposal has not yet been implemented.

(ii) British Columbia

In 1974 the Law Reform Commission of British Columbia[85] likewise proposed that the plaintiff's right and title should be extinguished upon expiry of the British Columbia limitation period. This proposal is now reflected in section 9 of the British Columbia Limitations Act 1975. The private international law implications of this change are different from those suggested in Ontario in that the British Columbia Law Reform Commission recommended,[86] and section 13 of the 1975 Act adopts, a special provision to cover the specific difficulty adverted to above[87] which arises where the limitation rule of the lex fori is substantive and that of the lex causae is procedural. Section 13 provides that,

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83 It is interesting to note that, unlike the conclusions reached by the Law Reform Commissions in Ontario and British Columbia, the Institute of Law Research and Reform in Alberta in a working paper on Limitation of Actions published in June 1977 considered in Section XIV whether lapse of time should serve to extinguish the cause of action, but concluded that it should not. They do not, however, appear to have considered the problem in a specifically private international law context.

84 Report on Limitation of Actions (1969), Ch. VII.

85 Report on Limitations: Part 2 (1974), p.97.

86 Ibid., pp.97-101.

87 See para.9(d), above.

where the British Columbia court determines that the limitations law of another jurisdiction is applicable but that law is classified as procedural for the purposes of private international law "the court may apply British Columbia limitation law or may apply the limitation law of the other jurisdiction if a more just result is produced".[88] We return to this development in paragraphs 51 and 52, below.

(c) Scotland

Prior to 1973 Scots law embodied a distinction, similar to that which prevails at present in this country, between those provisions which merely barred the plaintiff's remedy[89] and those which actually extinguished his right.[90] For private international law purposes such provisions were generally classified in the same fashion as in this country. Thus the former type were treated as procedural and the latter as substantive,[91] although there is a dictum to the effect that the long negative prescription (which extinguishes the plaintiff's right) had a dual character.[92]

However, in their Report on the Reform of the Law relating to Prescription and Limitation of Actions,[93] the Scottish Law Commission recommended that, with the exception of those provisions relating to actions for

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88 Limitations Act 1975, s.13 (British Columbia).

89 Under the old Scots Law, certain short negative prescriptions and the limitation based on the Law Reform (Limitation of Actions) Act 1954.

90 Septennial and long negative prescriptions.

91 Anton, Private International Law (1967), pp.223-228.

92 Stirling's Trustees v. The Legal and General Assurance Society Ltd. 1957 S.L.T. 73, 77.

93 Scot. Law Com. No. 15 (1970), para.88.

damages in respect of personal injuries,[94] all other limitation provisions[95] should operate so as to extinguish the plaintiff's right at the end of the requisite period. Whilst they did not examine in detail the private international law implications of this recommendation, they did observe[96] that such a change would obviate the difficulties encountered under the old system whereby a Scottish debtor might be exposed to the possibility of an action abroad without time limit.[97]

The main body of their recommendations was implemented by the Prescription and Limitation (Scotland) Act 1973. In view of the fact that this measure makes no alteration to the Scottish common law rules of classification, it would appear that a Scottish court will now regard Scottish prescriptive provisions as matters of substance in a conflicts case, (and therefore inapplicable to a case having a foreign lex causae) but will retain a procedural classification for those limitation provisions which relate to actions for damages in respect of personal injuries.[98]

Other developments

30. The recent developments which we have mentioned thus far have been either proposed or effected as statutory reforms. However, in the United States there also appears

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94 This is the subject of separate examination by the Scottish Law Commission: see Scot. Law Com. No. 55 (1978), para.31.

95 In Scots law, positive, long negative and short negative prescriptions.

96 Scot. Law Com. No. 15 (1970), para.87(3).

97 See para.18, above.

98 Walker, The Law of Prescription and Limitation of Actions in Scotland, 2nd ed., (1976), pp.4-6.

to be some judicial movement away from the traditional classification of statutes of limitation as procedural. In a recent New Jersey decision[99] on a cause of action governed by the law of North Carolina the court held that the North Carolina statute of limitations was substantive and therefore applicable. In dealing with the English rule, Hall J. observed that "It is, of course, judge-made and may be changed judicially, as we have done with respect to the matter of the substantive law to be applied to a foreign cause of action .... We think reexamination of the rule is in order."[100] It is still uncertain though how far this lead can be expected to be followed in other American states.[101]

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99 Heavner v. Uniroyal, Inc. 63 NJ 130; 305 A. 2d 412 (1973).

100 Ibid., p.415.

101 See Leflar, American Conflicts Law, 3rd ed., (1977) p.256; Wurfel, "Statutes of Limitation in the Conflict of Laws", (1974) 52 North Carolina L.Rev. 489, 560-7.

PART V: THE FIELD OF CHOICE

Introduction

31. In this Part we shall consider the principal alternative solutions to the English rule. Before doing so, however, we wish to mention briefly a number of policy factors which we think ought to guide our analysis of the field of choice.

Policy considerations

(A) Avoiding the difficulties which arise under the present law

32. In Part III of this paper we considered in some detail what we regarded as the most important criticisms of the English rule.[102] In seeking an alternative solution we have been guided by the desire both to avoid the difficulties inherent in the present law and at the same time to ensure, so far as is compatible with considerations of public policy, that the same law governs the origins, existence, extent and termination of legal rights and obligations. For this reason we believe that the distinction between right and remedy as the basis of classification of limitation ought to be avoided. Whilst the distinction may be of assistance in other areas of the law in order to draw the line between matters of procedure and those of substance, it is a highly artificial device in the context of time bars. We are also concerned that any reform should avoid the twin evils of encouraging "forum shopping" and uncertainty. It is desirable that, so far as possible, the outcome of proceedings should not depend on the forum in which they are instituted and that, particularly in commercial matters, the legal position of the parties should be clearly ascertainable from the outset. Finally, we are of the opinion that any new system should avoid the possibility, inherent in the present English rule, that no

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102 See paras.13-23, above.

period of limitation at all will be applicable to a particular cause of action. Actions ought to be brought within a pre-ordained time limit, and we do not see that there is any case for departing from this principle in relation to matters having a foreign lex causae.

(B) Considerations incidental to reference to the lex causae

33. The criticisms of the English rule advanced in Part III have convinced us that the determination of matters of limitation by reference only to the lex fori is unsatisfactory. We regard the broad choice of alternatives for reform as being between the reference of questions of limitation to the lex causae alone, or to some combination of the lex causae and the lex fori. Four considerations of policy are relevant when considering the application of the lex causae:

(a) As we have already seen,[103] if the United Kingdom accedes to the E.E.C. Convention on the law applicable to contractual obligations, the periods of limitation to be applied in contractual matters will be those of the proper law of the contract alone, not those of the lex fori.

(b) Any new rule of private international law which provided that matters of limitation should be determined in an English court by reference to the lex causae might be thought to rest on the assumption that a single lex causae can be ascertained. In almost all types of action this is a correct assumption. For instance, in all contractual matters, whether the applicable law is determined by our present choice of law rules or under the rules in the Convention mentioned above, the result will be a single lex causae applicable

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103 See para.23, above.

to the issue before the court. The one exception is tort where it is arguable that there may be no single lex causae. This difficulty arises because of the dual nature of the tort choice of law rule traditionally drawn from Phillips v. Eyre[104] (namely that to be actionable in this country a tort must be actionable under both English law and the law of the country where the tort was committed). This rule is in turn complicated by the uncertain effect of the decision of the House of Lords in Boys v. Chaplin[105] which indicates that the application of one or other of the limbs of the rule in Phillips v. Eyre may be dispensed with in appropriate circumstances.[106] We do not think, however, that the criticisms which may legitimately be made of the present choice of law rules in tort, either because of the dual nature of the rule or because of the uncertainty as to when one limb only will be applied, should be allowed to affect any reform of the law relating to classification of limitation. We take this view for two reasons. The first is that the application of the lex or leges causae to limitation issues arising in a tort action should lead to no more difficulty than does the application of the tort choice of law rules to any other substantive issue in such a case. For example, if the defendant pleads

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104 (1870) L.R. 6 Q.B. 1.

105 [1971] A.C. 356.

106 See Dicey and Morris, Conflict of Laws, 9th ed., (1973), pp.945-948; Cheshire and North, Private International Law, 10th ed., (1979), pp.264-266.

the defence of contributory negligence, the court must consider the effect of that defence under both the law of the country where the tort was committed and under the law of the forum.[107] Our second reason is that, whilst it may well be desirable to have only one lex causae in a tort claim whether the particular matter in issue be limitation, contributory negligence, or any other issue of substance, this is a matter which concerns reform of the tort choice of law rules, rather than of the limitation rules. Furthermore, the tort choice of law rules are now the subject of active review by us.[108]

(c) The possibility of different rules applying to the classification of limitation in private international law, according to whether the claim is founded on the breach of a contractual or a non-contractual obligation, ought to be avoided. This problem would arise if our contract choice of law rules were changed in line with the E.E.C. Convention discussed above without similar general reform of the classification of limitation, or if tort claims were excluded from the provisional recommendations made in this working paper until such time as a reform of the general choice of law rules in tort had been accomplished. In our view the

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107 See, e.g., Anderson v. Eric Anderson Radio and T.V. Pty. Ltd. (1965) 114 C.L.R. 20.

108 This work is being carried out by a Joint Working Party of the Law Commission and the Scottish Law Commission which is also to examine a proposal for an E.E.C. Convention on the law applicable to non-contractual obligations: see Law Com. No. 97, para.2.42.

problems posed in particular by claims being made in the alternative in tort and contract would make unworkable anything other than a general rule applicable to all types of claim.

(d) We are anxious that any new rule ought to be easy to ascertain and simple to apply. In particular, we believe that any new rule should exclude the general application of the doctrine of renvoi. Under this doctrine, the English court is called on to apply, not the internal law of the foreign lex causae, but its rules of private international law, i.e., whatever law a judge sitting in the country of the lex causae would have applied. This doctrine results in the English courts having to consider difficult questions of foreign private international law, sometimes involving reference of the matter in issue to the law of some third country or even back to English law. There are three reasons for our desire to exclude the application of the doctrine of renvoi in the present context. It adds generally to the complexity of determining the applicable law; our own choice of law rules now exclude renvoi both in relation to contract[109] and probably to tort;[110] and it is excluded from the choice of law rules in the draft E.E.C. Convention on the law applicable to contractual obligations.[111] Renvoi should only be relevant to a question

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109 Re United Railways of the Havana and Regla Warehouses Ltd. [1960] Ch. 52, 96-97, 115 (C.A.).

110 Dicey and Morris, The Conflict of Laws, 9th ed., (1973), p.968.

111 Art. 15.

of limitation in those few areas of law, such as succession, where the lex causae is, under our existing choice of law rules, determined by reference to the doctrine.[112]

(C) A general system of prescription?

34. A number of countries have overcome the difficulties posed by the English rule by adopting a general system of prescription.[113] Not only is such a recommendation beyond our terms of reference, but it would also be contrary to the conclusions reached by the Law Reform Committee in their recent Report on Limitation of Actions,[114] the policy of which is now reflected in the Limitation Amendment Bill at present before Parliament. Accordingly, we do not consider that a recommendation for the general adoption of a régime of prescription is open to us.

(D) The effect to be given to a foreign time bar by an English court

35. In practical terms it generally makes little difference to a plaintiff whether his right is extinguished or his remedy is barred.[115] Indeed it is for this reason that we think that the distinction between right and remedy ought no longer to form the basis of the choice of law rules for limitation. However, whether or not the plaintiff's right has been extinguished or his remedy merely barred could be of significance in later proceedings on a different cause

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112 See e.g., Re Annesley [1926] Ch. 692; Re Ross [1930] 1 Ch. 377.

113 See paras.28 and 29, above.

114 (1977), Cmnd. 6923, and see paras.1 and 15, above.

115 A list of the few situations where there may, in fact, be a difference is to be found in Franks, Limitation of Actions, (1959), pp.29-36; and see the Fourth Interim Report of the Law Revision Committee (1934), Cmnd. 4770, para.24.

of action, as where a creditor whose claim is statute-barred exercises a lien over goods in his possession[116] or an executor pays a statute-barred debt.[117] If the law is to be altered so that an English court is bound to apply the period of limitation fixed by the lex causae (in some or all circumstances) we think that it is important that the effect which is given by an English court to a foreign time-bar should be the same (as to whether it bars the plaintiff's remedy or extinguishes his right) as would have been given by the courts of the lex causae.

(E) Public policy

36. One of the arguments most frequently raised against applying the statute of limitation of the lex causae is that to do so would infringe the public policy of the forum.[118] We have already considered and rejected the converse argument (that public policy is actually served by the application of the limitation period of the lex fori) and the present contention is, in our opinion, no more persuasive. In modern times the English courts, whilst they have acknowledged that they have a discretion to refuse to apply foreign law when to do so would be inconsistent with some fundamental policy of English law, have tended to apply the doctrine of public policy restrictively in order to avoid frustrating the whole

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116 E.g., Re Lloyd [1903] 1 Ch. 385, 401; Spears v. Hartley (1800) 3 Esp. 81.

117 E.g., Re Rownson (1885) 29 Ch.D. 358.

118 See also para.21, above.

purpose of having rules of private international law.[119] We do not think that it is necessary generally to restrict the application of statutes of limitation of the lex causae in the interests of English public policy. This does not mean that considerations of public policy should be wholly excluded. For example, in those cases where the lex causae prescribed no period of limitation at all, or prescribed an unjustifiably long one, the narrow discretion which the English courts already have in matters of public policy (and which will be wholly unaffected by our proposals) will permit any such review as may be considered necessary.

(F) Practicality

37. Whilst the formulation of detailed procedural rules must follow the implementation of substantive changes in the law, the procedural implications of any recommended changes should not be ignored. A change in the law which resulted inevitably in the procedures of the court becoming far more complicated and expensive would be undesirable, however justifiable it might appear to be in theory. Whilst we have not thought it realistic to examine the procedural and practical implications of all the possible avenues of reform canvassed in this Part, we have, however, attempted in Part VII to analyse the procedural implications of the solution which we favour, and, as will be seen, we conclude that they are not such as to create real difficulties in the implementation of our provisional recommendation.

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119 See Dicey and Morris, The Conflict of Laws, 9th ed., (1973), pp.70-75; Cheshire and North, Private International Law, 10th ed., (1979), pp.145-155. Both cite with approval the words of Cardozo J. in Loucks v. Standard Oil Co. of New York (1918), 224 N.Y. 99, 111; 120 N.E. 198, 201-2; "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home .... The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."

Summary of alternative approaches to classification of limitation

38. The alternative solutions to the problem posed by the English rule seem to us to be as follows:

(a) Reclassification of statutes of limitation, both domestic and foreign, as substantive for choice of law purposes.[120]

(b) The so-called "foreign court's interpretation test" whereby the forum follows the classification accorded to a foreign statute of limitation by the courts of the country of the lex causae.[121]

(c) Reclassification of English statutes of limitation as substantive for choice of law purposes coupled with the classification of the statute of limitation of the lex causae in the same way as it is classified by that law. This solution would also provide that if the classification of the statute of limitation of the lex causae is procedural the English statutes of limitation as the lex fori should apply.[122]

(d) A "borrowing statute".[123]

(e) The "British Columbia solution".[124]

(f) The "New South Wales solution".[125]

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120 See paras.39-42, below.

121 See paras.43-44, below.

122 See paras.45-47, below.

123 See paras.27, above and 48-49, below.

124 See paras.29(b) (ii), above and 50-51, below.

125 See paras.29(a), above and 52-53, below.

Analysis of alternative solutions

(A) General reclassification of limitation for choice of law purposes

Introduction

39. The main feature of this solution would be the application of the period of limitation of the lex causae. This is because:

(a) For choice of law purposes, all statutes of limitation, whether English or foreign, would be regarded by the English courts as substantive;

(b) The classification accorded by the courts of the lex causae to their own statutes of limitation would be disregarded by an English court in deciding whether the English or the appropriate foreign period of limitation is to apply to a matter having a foreign lex causae.

40. In practical terms we believe that the main effect of this solution would be that the limitation period of the lex causae would be applied in all cases involving a foreign element which came before an English court. However, we believe that an incidental effect of this solution might be that because of the reclassification of the English statutes of limitation as substantive for choice of law purposes, a foreign court, particularly one in another common law jurisdiction,[126] might be more likely to apply the appropriate English period when English law is the lex causae.

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126 Some civil law jurisdictions already treat English statutes of limitation as substantive or as a combination of substantive and procedural: see para.18, above.

41. Two aspects of this solution call for special comment:

(a) Because it is based on the premise that it is desirable for an English court always to apply the period of limitation of the lex causae, it requires the English court to regard all statutes of limitation as substantive. If only the English statute were reclassified, the situation (which we have already noted above as a defect in the present English rule) might arise where no period at all was applicable because the statute of limitation of the lex fori was regarded as substantive and that of the lex causae as procedural.[127]

(b) For similar reasons it is a corollary of this solution that the English court should disregard the classification accorded by the courts of the lex causae to their own statute of limitation.

Analysis

42. We are attracted by the simplicity of this solution. We consider that it accords well with the policy objectives which we outlined in the first section of this Part. The only feature which we think might prove controversial is the fact that it would expressly disregard any classification accorded by the courts of the lex causae to their own statute of limitation. However, we do not regard this as a particularly serious objection. It is largely technical and conceptual because, in practical terms, the effect of this solution will merely be that an English court will decide a limitation point in the same way as would the courts of the lex causae if they were applying their own internal law. Conversely, we believe that to bind an English court to

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127 See para.9(d), above.

follow the classification accorded by the courts of the lex causae to their own statute of limitation would commit it to a course which would not always provide a reliable answer to the main question before the English court, namely whether the appropriate foreign period of limitation ought to be applied in a choice of law case along with the rest of the substantive law. We have reached this conclusion for a number of reasons.[128] First, the foreign court's classification might be only relevant for a specific domestic purpose. Secondly, where for example a Ruritanian court has classified its statute of limitation for the purposes of private international law, this classification will almost certainly have been made in order to determine whether the Ruritanian statute should apply, as the lex fori, to a case heard in Ruritania, rather than whether it should apply in a case heard in England where Ruritanian law is the lex causae. Finally, of course, the Ruritanian court's classification for private international law purposes might also take account of its adherence to the doctrine of renvoi, which as we have mentioned in paragraph 33(d) above, we are anxious to avoid except in those few areas where it is already an established feature of our choice of law rules.

(B) The "foreign court's interpretation test"

Introduction

43. If adopted in this country, the "foreign court's interpretation test" would require the English court, as the court of the forum, to examine the lex causae in order to determine whether the courts of that country classified their own limitation statute as substantive or procedural. If such an examination revealed that the foreign statute was regarded as substantive, the English courts would then be required to

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128 See also paras.44(a) and 47(a), below.

apply it to the case in hand.[129] If, on the other hand, the foreign statute was regarded by the foreign court as procedural, then the English statute being procedural in nature would be applicable as the lex fori. There is some American[130] authority for the "foreign court's interpretation test", and a few academic commentators[131] have also favoured it.

Analysis

44. On examination we think that this solution is open to a number of substantial criticisms:

(a) To ask an English court to examine a foreign rule as to limitation and to determine how that rule is classified under foreign law is to impose a quite unreasonable burden on the court. The application of any foreign rule of law involves the giving of expert evidence to an English court on the foreign law. This is unavoidable unless one is to abandon the application of foreign law to cases before English courts. It is one thing, however, for evidence to be given of foreign substantive law; it is quite another for evidence to have to be given as to foreign rules of private international law which may well be far from clearly worked out on matters such as classification and renvoi. We do not believe that it is desirable for an English court to have to try to ascertain how the courts of the country of the lex causae would have classified a limitation statute for the

129 Subject to the reservation in para.44(e), below.

130 Goodwin v. Townsend (1952) 197 F. 2d 970 (3rd Cir.).

131 E.g. R.M.Z., "Statutes of Limitation: lex loci or lex fori", (1961) 47 Virginia L. Rev. 299. For an analysis of some of the disadvantages, see Rabel, The Conflict of Laws, 2nd ed.,(1964), Vol.III, p.532.

purposes of its possible application by the courts of another country.

(b) On the assumption that the lex causae classifies its statute of limitation as procedural, then, in the rare cases when the English statute (as the law of the forum) is classified by the English Court as substantive, the result would be, in theory at least, that neither statute of limitation would be applicable.[132]

(c) Where the courts of the country of the lex causae regard their own statute of limitation as a question of procedure, and the English statute is also classified by the English court as procedural, then the English statute would be applicable to a case heard in England. This appears to us to be undesirable because the practical effects of the expiry of a period of limitation are in reality substantive.[133]

(d) The theoretical possibility of "forum shopping" would continue in circumstances where the statute of limitation of the lex causae is regarded by the relevant foreign court as procedural.

(e) Where the statute of limitation of the lex causae is classified as substantive and the English statute is regarded as procedural the problems described in paragraph 9(b) above would remain, i.e. both periods of limitation would, in theory, be applicable. We have

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132 See para.9(d), above and see also Rabel, The Conflict of Laws, 2nd ed., (1964), Vol. III, p.532.

133 See paras.16 and 32, above.

already seen that the solutions adopted in practice to this conundrum are not satisfactory.[134] At present they are only alleviated by the fact that in practice the English courts regard most foreign statutes of limitation as procedural. If the "foreign court's interpretation test" were to be adopted in this country we think that this problem is likely to become worse because the substantive classification of many foreign limitation provisions would then have to be recognised by the English courts.

(f) Finally, if the argument examined in paragraph 18 above (to the effect that a debtor under a contract governed by English law might be exposed to a possible action abroad without time limit where the procedural classification of an English limitation statute is accepted by a foreign court) is correct, it would provide a further criticism of this solution which has no effect on the generally procedural classification[135] accorded by English courts to English statutes of limitation.

(C) Reclassification of English statutes of limitation, coupled with the application of the "foreign court's interpretation test" to foreign statutes

Introduction

45. It might be possible to overcome a number of the problems which we have noted in relation to the "foreign court's interpretation test" by incorporating into it a

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134 See para.9(b), above.

135 Subject to the exceptions mentioned in para.8, above.

number of the features of the first solution which we canvassed. What we have in mind is a solution along the following lines:

(a) For choice of law purposes all English statutes of limitation should be regarded by the English courts as substantive;

(b) In classifying the statute of limitation of the lex causae an English court should follow the classification accorded to it by the courts of that country (the "foreign court's interpretation test");

(c) In the event that the "foreign court's interpretation test" results in a procedural classification, the English court should apply the English period of limitation (the lex fori).

Analysis

46. At first sight this seems to offer a better solution than that described in paragraphs 43 and 44. By classifying the English statute of limitation as substantive, it avoids the problems implicit in the "foreign court's interpretation test" described in paragraphs 44(e) and (f) above. Moreover, by incorporating the proviso in paragraph 45(c) above it avoids the theoretical difficulty that no period at all will be applicable where the statute of the lex fori is substantive and that of the lex causae is procedural.

47. However, we do see a number of difficulties with this solution:

(a) It is open to the major objection outlined in paragraph 44(a) in the context of the "foreign court's interpretation test". It involves an English court having to determine, often on the basis of conflicting expert evidence,

difficult questions as to the private international law rules of the lex causae. We see no merit in imposing such tasks on our courts.

(b) In the circumstances outlined in paragraph 45(c) above, the English statute of limitation would apply to determine the limits of a foreign obligation. We have already said that we think that, as a matter of principle, the origins, existence, extent, and termination of legal rights ought to be governed by the same body of rules unless there are pressing policy considerations for doing otherwise. We are not convinced that such considerations generally apply in the field of limitation.

(c) Moreover, it seems that as the law stands at present the proviso mentioned in paragraph 45(c) might frequently have to be invoked. Although there is evidence of a movement in the common law world towards the adoption of prescriptive systems which are likely to be classified as substantive, this development has so far had only a limited impact. Many jurisdictions with which this country is closely connected, for instance the United States, still treat statutes of limitation as procedural.

(d) As far as commercial dealings are concerned, this solution is likely to cause difficulties for the parties in ascertaining at the outset the extent of their obligations. Likewise, in view of the English procedural rule which requires a statute of limitation to be specifically pleaded if the defendant is to have the advantage of it,[136] we anticipate

136 R.S.C., O.18, r.8.

that complicated pleadings in the alternative might be necessary pending the English court's determination of what classification is to be accorded to a foreign statute.

(e) In the event that the foreign court treats its statute of limitation as procedural, the possibility of "forum shopping" will continue where the foreign period has elapsed but the English period (applicable by virtue of the proviso in paragraph 45(c) above) has not.

(D) A "borrowing statute"

Introduction

48. We have already seen[137] that "borrowing statutes" have been enacted in most of the states of the U.S.A. in order to meet the limitation problems frequently encountered where a claim has connections with a number of states. Such statutes generally operate so as to bar an action in the forum if it is already barred in the place where the cause of action arose, or alternatively if it is barred by the law of the place where the defendant, or both parties, resided.[138] Even though for some purposes[139] a "borrowing statute" ensures that in practice the lex causae governs questions of limitation, strictly speaking it requires no theoretical

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137 See para.27, and n.79, above.

138 As such they are not dissimilar to a solution suggested by the American scholar Lorenzen in Selected Articles on the Conflict of Laws (1947), Ch. 12, to the effect that the interests of public policy in the forum and the desirability of the forum's refusing to enforce a right barred by the lex causae were best balanced by applying the shorter of the periods laid down by the lex causae and the lex fori. The same criticisms would seem to apply to this solution as to "borrowing statutes" generally.

139 See para.49, below.

reorientation of traditional concepts. The forum still regards limitation as primarily procedural, to be governed by the lex fori. The only difference is that for the purposes of determining the correct period of limitation certain relevant provisions of the lex causae are incorporated into the lex fori.

Analysis

49. Much has been written[140] (largely in the United States) about "borrowing statutes", but the general consensus of opinion is that they are not a satisfactory solution to the problems posed by the English rule. Obviously criticisms relating to the diversity or ambiguous drafting of individual statutes are not applicable in the present context. However, some of the more general problems which have been identified in relation to "borrowing statutes" might be equally relevant to the use of such a statute in an English context. The most pertinent seem to be that:

(a) They are only partial solutions to the problem, because they leave intact, or have been interpreted as so leaving, all the domestic limitation provisions.[141] They operate only where the relevant foreign period is shorter than that of the lex fori. Where it is longer the plaintiff must still seek redress in another forum. This feature would frustrate a number of the policy objectives which we believe

140 See n.79, above.

141 Even in Kentucky, where it was once held that the Kentucky "borrowing statute" required the application of the appropriate foreign period regardless of its length, the shorter period is now applied: see Seat v. Eastern Greyhound Lines Inc. 389 S.W. 2d 908 (Ky. 1965).

should be sought by any reform of the English rule. In particular it denies to the lex causae the decisive role which we think that it ought to play in an English court's selection of the appropriate period of limitation. Conversely, it attaches too much weight to the statute of limitation of the lex fori as representing the forum's public policy.

(b) We do not see any good reason why the defendant should always have the benefit of the shorter of the periods of limitation of the lex causae and of the lex fori. A borrowing statute has this result.

(c) A borrowing statute, as we have seen above, involves no reclassification of the English law of limitations. Accordingly, the problem outlined in paragraph 18 above would remain, i.e. a debtor under a contract whose proper law is English might find himself liable to suit in a foreign court without time limit because that court both accepted the procedural classification accorded by English courts to English statutes of limitation and classified its own statute as substantive, and thus found neither statute to be applicable to the debtor's case.

(E) The "British Columbia solution"

Introduction

50. As we have mentioned above[142] the position in British Columbia regarding the classification of statutes of limitation in private international law is now governed, at least in part, by two statutory provisions:

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142 See para.29(b)(ii), above.

(a) Section 9 of the Limitations Act 1975 which provides for a system of prescription in British Columbia rather than one of limitation; and

(b) section 13 of the same Act which provides that in a case where not only is the British Columbia statute classified as substantive, but the foreign statute is classified as procedural,[143] a court in British Columbia has a discretion which provision to apply.

Analysis

51. We feel that this approach would not be appropriate in an English context for the following reasons:

(a) As a result of their adoption of a prescriptive régime, it now seems to be implicit in the "British Columbia solution" that their own statute of limitation will (as a matter of substantive law) be applicable whenever the law of British Columbia is determined to be the lex causae. Likewise where a British Columbia court is dealing with a case having a foreign lex causae, it will apply the statute of the lex causae where such statute is classified as substantive. However, although we think that these results are desirable[144] they are entirely dependent on the adoption in that jurisdiction of a system of prescription. In contrast our own examination of the problem

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143 The section does not specifically state whether such a procedural classification is that made by a British Columbia court as the court of the forum, or is that accorded by the courts of the country of the lex causae.

144 See paras.32-37, above.

of the classification of statutes of limitation necessarily proceeds on the basis that this country should retain a system of limitation.[145]

(b) The "British Columbia solution" is a compromise. Despite the fact that the British Columbia statute of limitation is now classified as substantive, it may still be applied by a British Columbia court to a case which has a foreign lex causae in the circumstances provided for by section 13 of the 1975 Act.[146] We do not think that this is satisfactory because we think that limitation ought to be regarded as a matter of substance and should therefore be governed in all cases by the lex causae.[147]

(F) The "New South Wales solution"

Introduction

52. This solution involves (i) providing for a prescriptive system in domestic law and (ii) ensuring that the New South Wales statute of limitation applies not only to all cases heard in New South Wales, but also endeavouring to ensure that it is applied to any case heard abroad where New South Wales law is the lex causae[148] (on the assumption that the foreign jurisdiction applies the substantive law of the lex causae).

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145 See para.34, above.

146 See para.50(b), above.

147 Subject to public policy exceptions.

148 See para.29(a), above.

Analysis

53. We do not, however, consider that this solution would really be an appropriate one for this country for the following reasons:

(a) As with the "British Columbia solution" discussed above, the "New South Wales solution" appears to centre on the adoption of a system of prescription whereas this country has retained a system of limitation and we do not consider that a recommendation for the adoption of a regime of prescription is open to us.[149]

(b) We do not think that the statute of limitation of the lex fori should fix the period for which a foreign obligation can be enforced.[150] The New South Wales system is based on the assumption that it should.

(c) We find the New South Wales scheme conceptually unsatisfactory when looked at from the standpoint of a traditional understanding of private international law. It is usual to consider that, if a statute bars the plaintiff's right as well as his remedy, it affects the substance of his obligation and is therefore applicable only as the lex causae and not as the lex fori. Although the effect of the New South Wales limitation statute is now to bar the plaintiff's right, it is however expressly provided by section 14 of their Limitation Act 1969 that the statute should

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149 See paras.1, 34 and 51, above.

150 See Part III, above.

govern all actions brought in New South Wales whatever be the lex causae. This suggests that the New South Wales courts will continue to classify limitation provisions generally as procedural, a view which seems to be reinforced by the decision of the New South Wales Court of Appeal in Panozza Pty. Ltd. v. Allied Interstate (Q) Pty. Ltd.[151]

(d) We also agree with the criticism of the New South Wales scheme made by the Ontario Law Reform Commission[152] that, in theory at least, by providing that the New South Wales limitation provisions should govern all cases at home where New South Wales law is the lex fori, and those abroad when it is the lex causae, New South Wales is "trying to have it both ways" and is ignoring the role which mutuality should play in private international law. Accordingly we believe that if a case should arise involving the law of two countries both adhering to the "New South Wales solution", the limitation provisions of both the lex fori and the lex causae might theoretically be applicable, a consequence which we have already marked as an undesirable aspect of the present English rule.[153]

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151 [1976] 2 N.S.W.L.R. 192. It should be noted that this case did not concern a limitation statute as such, but rather a statutory requirement implied into the parties' contract by the lex causae to the effect that, in order to claim against a carrier of goods, notice of loss or damage must have been given to the carrier within five days of the claimant becoming aware of the loss or damage. By analogy, however, it seems likely that the decision will be regarded as significant in the field of limitation. See in particular the remarks made by Reynolds J.A. at pp.197-8.

152 Report on Limitation of Actions (1969), p.135.

153 See para.9(b), above.

PART VI: PROVISIONAL RECOMMENDATIONS

54. At the end of Part III of this paper we concluded that the English rule which classifies statutes of limitation as matters of procedure was in need of reform. In Part V we first identified the policy considerations which in our view ought to guide any reform, and then we analysed the field of choice open to us in the light of those considerations. On the basis of this examination we think that the real choice of solutions for reforming the law lies between:

(a) A reclassification of statutes of limitation, both domestic and foreign, as substantive for choice of law purposes (irrespective of any foreign classification accorded to the foreign statutes) (Solution (i));[154] and

(b) A reclassification of English statutes of limitation as substantive for choice of law purposes coupled with a classification of the statute of limitation of the lex causae in the same way as it is classified by that law. This solution would also provide that, if the classification of the statute of limitation of the lex causae is procedural the English statutes of limitation as the lex fori should apply (Solution (ii)).[155]

55. As between Solutions (i) and (ii), our provisional conclusion is to favour (i) for the following reasons:

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154 See paras.38(a) and 39-42, above.

155 See paras.38(c) and 45-47, above.

(a) As a matter of principle we think that the lex causae should determine all questions of limitation. In practice limitation affects the substance of the parties' obligation, and we think it is right that the same law should determine all matters considered by the English court as relating to substance, subject of course to the English court's limited discretion regarding public policy. Solution (ii) would only partially accord with this principle. Under it a substantial number of cases having a foreign lex causae would still be governed in matters of limitation by English law as the lex fori.[156]

(b) We think that Solution (i) would provide both the parties and the English courts with a simple and certain rule to follow in all cases. Solution (ii) is more complicated.[157] It involves an English court determining, on the basis of conflicting expert evidence, the classification given to a statute of limitation by the lex causae, with the corollary that, if the foreign classification is procedural, a different law, i.e. English law as the lex fori, will then have to be applied. Furthermore, this difficult and uncertain analysis will have to be undertaken both by a plaintiff in deciding the period of time within which he must issue his writ, and by a defendant who would have to plead both statutes of limitation in order to be sure of getting the benefit of whichever the court decides is applicable. Solution (i)

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156 See paras.47(b) and (c), above.

157 See paras.47(a), (b) and (d), above.

would also, we think, entirely preclude any possibility of "forum shopping" in this country which we do not consider will be the case under Solution (ii).

(c) Given that we are proposing that, whatever solution is finally adopted, an English court ought to give a foreign statute of prescription or limitation the same effect as it would have been given by the courts of the lex causae,[158] we see no advantage in relying on the foreign court's classification of its own statute of limitation as does Solution (ii).

(d) Whereas Solution (i) has substantially the same effect as the present draft E.E.C. Convention on the law applicable to contractual obligations,[159] Solution (ii) would introduce a different rule for those cases which were not covered by the Convention, and were referable to the lex fori by reason of the fact that the statute of limitation of the lex causae was classified by that law as procedural. We do not think that this complexity of rules is desirable.

(e) The only difficulty which we anticipate in adopting Solution (i) centres on the selection of a single lex causae in tort cases. Not only would this difficulty also arise in relation to Solution (ii), but, as we have said above, we do not regard it as a problem which should be allowed to impede reform in this field.[160]

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158 See para.35, above.

159 See paras.23 and 33(a), above.

160 See para.33(b), above.

56. Accordingly our provisional recommendations[161] for reform of the law relating to the classification of limitation in private international law are as follows:

(a) All statutes of limitation, whether English or foreign, and whether classified as substantive or procedural by a foreign court, should be classified as substantive in this country for choice of law purposes;

(b) This recommendation should be subject to two provisos, namely that:

(i) the effect given by the English courts to the expiry of a period of limitation or prescription applicable under the law of a foreign country should be the same as would have been given by the courts of that foreign country;[162]

(ii) there should be no change in the discretion of the English courts in matters of public policy.[163]

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161 For our provisional recommendations on related matters, see Parts VII and VIII, below.

162 See para.35, above.

163 See para.36, above.

PART VII: INCIDENTAL EFFECTS OF ALTERING THE ENGLISH RULE

Introduction

57. We have already said[164] that we consider the practical implications of any proposed change to be an important element of policy in deciding whether the current English rule ought to be altered. It is neither practicable nor, in our view, necessary to examine the incidental effects of all those possible solutions which we have canvassed in Part V of this paper. We have, however, attempted in this section to assess the practical consequences of the solution which we recommended provisionally in Part VI. Our conclusion is that the impact of the changes which we recommend will be fairly small. Moreover we are reinforced in this belief by the knowledge that the rule which we recommend, namely the application of the period of limitation of the lex causae, is applied already by the English courts in those cases where they regard the relevant statute of limitation of the lex causae as being substantive. However, we are aware that the subject of limitation bears upon many aspects of practice and procedure, and we would therefore particularly welcome comments in this area.

Analogous provisions

58. The focus of this paper has been concentrated up to this point on statutory limitation provisions. However, we are aware that the concept of limitation is often important in a non-statutory context. For instance, a contract may specify that a party's right of action is dependent upon a specified period of notice being given to the other party. Similarly, in some jurisdictions certain rights, such as the right to rescind a contract, are exercisable only within a reasonable time.

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164 See para.37, above.

59. Accordingly we have considered the nature of some of these provisions analogous to statutory periods of limitation, but we have concluded that no specific recommendation thereon is necessary within the framework of this working paper. Our reasons are twofold. In the first place contractual stipulations as to time are infinitely varied, and we therefore think it inappropriate to lay down by statute that they should all be governed by the lex causae.[165] Instead we believe it is for the court to construe such provisions and to determine the appropriate law to govern them. Secondly, we are of the opinion that if a court were called on to adjudicate on many of these non-statutory (contractual or non-contractual) time bars it would probably do so in a way consistent with the main recommendations in this working paper. It has been suggested,[166] for instance, that a court would hold that a right which was exercisable only within what the contract expressed as a "reasonable time" was extinguished if not exercised within such a period. Consequently even on the basis of the current English rule as to limitation, the court would probably classify such a right as going to the substance of the transaction, with the result that a "reasonable time" would be calculated by reference to the lex causae. We would, however, welcome comments as to whether the recommendations in Part VI are likely to create difficulties in this context of other statutory or non-statutory time bars.

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165 As where the time limit concerns "the method and manner of performance", which is governed by the place of the performance of the contract: see Dicey and Morris, The Conflict of Laws, 9th ed., (1973), pp.793-5.

166 Dicey and Morris, The Conflict of Laws, 9th ed., (1973), pp.1105-6.

Suspension of limitation

60. In Part VI we have recommended the adoption in this country of a choice of law rule which would in effect cause the period of limitation of the lex causae to be applied to any claim heard before the courts in England and Wales. In making this proposal we have considered whether an English court should, in applying the period of limitation of the lex causae, merely adopt the appropriate time-bar prescribed by that law or whether it ought to have regard to the whole body of limitation legislation of the lex causae, including any provisions which prevent time from running against the plaintiff.

61. In this country time will not run against a plaintiff in a number of circumstances. For instance, if at the time at which his right of action accrues the plaintiff is a minor or of unsound mind the appropriate period of limitation will run from the date on which his disability ceases or he dies, whichever first occurs.[167] Similar provisions can be found in other jurisdictions.[168] It seems to us that rules which suspend the running of time in particular circumstances are an integral part of a country's system of limitation and that therefore, as a matter of general principle, if an English court is to apply a limitation period fixed by the lex causae it should have regard to the whole body of that law, including any specific provisions which might prevent time from running.

62. However, in recommending that an English court should have regard to the whole body of the domestic law of the lex causae, we feel that it may be desirable to make an exception

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167 Limitation Act 1939, s.22. The general statement in the text is qualified by certain provisos mentioned in the section.

168 E.g., New South Wales Limitation Act 1969, s.52; British Columbia Limitations Act 1975, s.7; Prescription and Limitation (Scotland) Act 1973, s.6(4)(b); Nova Scotia Limitation of Actions Act, R.S.N.S. 1967, c.168, s.3.

in relation to one particular type of provision which preserves a plaintiff's right of action beyond the usual period of limitation. In this country it used to be provided that, if a plaintiff was abroad when his cause of action accrued, he might still bring an action within the statutory period after his return.[169] Conversely, if the defendant was abroad when the plaintiff's right of action accrued, time only ran against the plaintiff after the defendant's return.[170] Both provisions have now disappeared from English law,[171] but similar rules may sometimes be found in other jurisdictions.[172] Moreover, in the United States, where provisions which suspend the running of time during the defendant's absence from the jurisdiction are still common, such rules have been observed to cause difficulties in the context of private international law, and we anticipate that similar difficulties may arise in this country. The problem which we anticipate may be illustrated by the following example:

> An issue which is governed by Ruritanian law as the lex causae falls to be determined by an English court. The court would, under our proposals, be bound to apply the period of limitation, together with any provisions suspending such period, adopted by the lex causae. Ruritanian law contains a provision

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169 Limitation Act 1623, s.7.

170 4 and 5 Anne, c.3, ss.18 and 19 (1705).

171 That concerning the plaintiff's absence was removed by virtue of the Mercantile Law Amendment Act 1856, s.10. That concerning the defendant's absence was repealed by the Limitation Act 1939.

172 Particularly in the United States, where such provisions are known as "tolling provisions". See, for example, Leflar, American Conflicts Law, 3rd ed., (1979), pp.256-257. However, there appears to be a general movement away from such exceptions. See, for instance, the New South Wales Limitation Act 1969 and the British Columbia Limitations Act 1975, neither of which retain the old suspensive provisions, based on the plaintiff's or the defendant's absence from the jurisdiction, which used to exist in those countries.

which suspends the running of its period of limitation during the defendant's absence from Ruritania. The defendant has permanently left Ruritania and now lives in England. In this situation, unless the defendant returns to Ruritania and is sued there, he will remain technically liable to suit indefinitely in this country. This is because the English court is bound to apply Ruritanian law, and whilst the defendant is absent from Ruritania, the Ruritanian statute of limitation does not operate.

63. We have already said, in the context of the present English rule,[173] that we do not think that it is right that a defendant should be exposed to the possibility of an action indefinitely. Accordingly, we think that there are three possible ways of dealing with this particular problem:

(a) To make no special provision beyond a general rule that the English courts should apply the period of limitation adopted by the lex causae where to do so would not be inconsistent with public policy. Where therefore a plaintiff seeks to enforce his claim in this country in circumstances such as those mentioned in the above example, the English court would have a residual discretion to refuse to apply the foreign lex causae, in whole or in part.

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173 See para.17, above.

(b) To provide that where the period of limitation adopted by the lex causae is suspended by reason of either party's[174] absence from the jurisdiction, an action in this country should be barred a fixed number of years after the limitation period of the lex causae would have expired had it not been for the suspensive provision.

(c) To provide that where the period of limitation adopted by the lex causae is suspended by reason of either party's absence from the jurisdiction, the English court should apply the period of limitation without regard to the suspensive provision.

We have not ourselves reached any firm conclusion as to which solution would be the most appropriate. At present we are attracted to the simplicity of the third, but we would welcome comments on all three, or any other alternative.[175]

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174 In the example which we have given in para.62, above, we took the case of a period of limitation which was suspended by reason of the defendant's absence. However, we believe that the considerations are essentially the same whether it is the absence of the plaintiff or the defendant which suspends the running of time. We therefore think that any proposal to deal with this problem should be broad enough to cover the absence of either party.

175 We realise that these suggestions might seem to be conceptually inconsistent with our recommendation at para.56(b)(i), above, to the effect that the expiry of a foreign period of limitation should be given the same effect in this country as it would have been given under the law of the country from which it was drawn. However such inconsistency appears to us to be justified by the practical necessity of ensuring that all claims are governed by some ascertainable period of limitation.

Foreign judgments

(A) Introduction

64. One area, in which the traditional English rule relating to the classification of limitation in private international law has occasioned considerable difficulty and aroused a certain degree of criticism,[176] is the field of recognition of foreign judgments based on a limitation point. We therefore think that it is important that, in making recommendations for a change in the classification of statutes of limitation for choice of law purposes, we should also attempt to resolve these difficulties.

(B) The relationship between classification of limitation and foreign judgments

65. It might be helpful to indicate the circumstances in which the issue of the classification of a statute of limitation may arise in the context of recognition of a foreign judgment. Two different situations must be examined.

(a) Foreign judgment in favour of a plaintiff

This is the most common situation where recognition and enforcement of a foreign judgment is sought in England. The successful plaintiff in the foreign proceedings will wish to enforce the judgment against the defendant in England. We do not think that a defendant who raised a limitation issue in the foreign court without success will be able to raise that issue again in England when

176 See Harris v. Quine (1869) L.R. 4 Q.B. 653, 657, per Cockburn C.J.; Lipstein, [1974] C.L.J. 229; Cohn, (1974) 90 L.Q.R. 306; Jaffey, (1975) 38 M.L.R. 585.

recognition is sought here. The foreign judgment in favour of the plaintiff will be final, and will have been given "on the merits".[177] Whether or not the foreign court classified its own statute of limitation as procedural and applied it, or regarded limitation as a substantive issue and applied the lex causae, there seems to be no ground for refusing recognition under the present law. Our recommendation that statutes of limitation should in future be classified as substantive will leave the position unaffected.

(b) Foreign judgment in favour of a defendant

This is a very different situation. In this case, one must assume that the defendant in the foreign proceedings is being sued by the same plaintiff in England. The defendant wishes to rely on the foreign judgment as a defence to the English proceedings. He will be able to do this if the foreign judgment is regarded in England as conclusive "on the merits", because he will then be able to rely on the principles of estoppel per rem judicatam. It is essential, however, that the foreign judgment has been given "on the merits" and it is in this area that the issue of limitation has arisen. Put quite simply, the issue is whether a foreign

177 In so far as this is a necessary requirement for the recognition of a foreign judgment in favour of a plaintiff: see Dicey and Morris, The Conflict of Laws, 9th ed., (1973), p.1019.

judgment given in favour of a defendant on a limitation point is to be regarded in England as a judgment "on the merits". The issue has arisen both in the context of the recognition of a foreign judgment under the common law rules of recognition[178] and also in the context of recognition under the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933 which governs the reciprocal recognition of judgments between the United Kingdom and a small number of foreign countries, including Germany.[179] We shall examine both situations in turn.

(C) Harris v. Quine:[180] recognition of a foreign judgment on a limitation point under common law rules

66. In Harris v. Quine, the plaintiffs brought an action in the Isle of Man claiming professional fees due to them from the defendant. The Manx court gave judgment for the defendant on the ground that, under the Manx statute of limitation, the action was statute-barred. Before the English limitation period had expired, the plaintiffs brought a fresh action in England against the defendant for the recovery of the same amount. The defendant pleaded the Manx judgment as a bar to these later English proceedings. This plea was rejected because the Manx statute was regarded as only procedural in nature. In the words of Cockburn C.J.:

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178 Harris v. Quine (1869) L.R. 4 Q.B. 653.

179 Black-Clawson International Ltd. v. Papierwerke Waldhoff-Aschaffenburg A.G. [1975] A.C. 591.

180 (1869) L.R. 4 Q.B. 653.

"There is no judgment of the Manx court barring the present action, as there was no plea going to the merits according to the view which we are bound to take of the Manx statute of limitations."[181]

(D) Black-Clawson International Ltd. v. Papierwerke Waldhoff-Aschaffenburg A.G.:[182] recognition of a foreign judgment on a limitation point under the Foreign Judgments (Reciprocal Enforcement) Act 1933

67. In Black-Clawson, the plaintiffs brought an action in Germany on two bills of exchange. The defendants successfully argued before the German courts that the action was statute-barred under the German statute of limitations. The plaintiffs also sued in England, being within the English period of limitation; but the defendants argued that the German judgment ought to be recognised under the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933, which statute applies to the recognition of the judgments of German courts. A major issue before the House of Lords was whether, in the case of recognition of German judgments in favour of a defendant, the 1933 Act and, in particular, section 8(1),[183] required the foreign judgment to have been given "on the merits". A majority of their Lordships decided that the common law rule expounded in Harris v. Quine[184] was unaffected by section 8(1), and that the German judgment being on a limitation point was not a judgment "on the merits"

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181 (1869) L.R. 4 Q.B. 653, 657.

182 [1975] A.C. 591.

183 Section 8(1) provides that "... a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, ... shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in any such proceedings".

184 (1869) L.R. 4 Q.B. 653.

and so did not operate as a bar to the later English action.[185] Accordingly, the plaintiffs were able to proceed in this country notwithstanding the German judgment.

(E) The effects of our provisional recommendations in the field of foreign judgments

68. As we have indicated above, both of these cases have been criticised.[186] In as much as they serve to highlight some of the less fortunate aspects of the English rule, for instance in extending by analogy the classification of statutes of limitation for choice of law purposes by reference to right and remedy into the field of foreign judgments, in permitting the plaintiff to do something which he could no longer do under the lex causae, and in ignoring the substantive effect of the expiry of a period of limitation,[187] they can be said to provide yet another dimension to the criticisms of, and arguments for changing, the English rule. However, our main concern in this section of the paper is to examine the effects which our provisional proposals will have on the recognition of foreign judgments and it is to those that we now turn.

69. The ratio decidendi to be drawn from the Black-Clawson case would appear to be that a foreign judgment on a limitation point is not normally to be regarded by the English courts as conclusive because it is not a judgment "on the merits". Consequently, it gives rise to no estoppel in later English proceedings. If this country were to adopt a rule

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185 Lord Reid also took the view that s.8(1) did not apply to a foreign judgment in favour of a defendant.

186 See n.176, above.

187 This was particularly apparent in the Black-Clawson case where the court ignored the fact that in Germany it is agreed that s.222 of the German Civil Code has a substantive effect.

whereby statutes of limitation were classified as substantive, we anticipate that the end result in a future case on facts similar to those in Black-Clawson would probably be different. This is because the English court would be bound to recognise the German judgment on the ground that it would be conclusive of an issue upon which the English court would also have to adjudicate, namely whether the German statute of limitation (applicable under the rule which we provisionally recommend to cases heard in England where German law is the lex causae) bars the action. Accordingly, the German judgment in favour of the defendant would be recognised and this would bar any action by the plaintiff in this country. This, we feel, is the desirable and logical result so far as limitation is concerned.

70. We have seen that one basis of the decisions in Harris v. Quine[188] and Black-Clawson was that a judgment delivered on a limitation point was not a "judgment on the merits" (and accordingly not recognisable by the English court). Although two of their Lordships in Black-Clawson had no serious doubts as to the meaning of this phrase, we agree with the view of Lord Diplock that it is "elusive as a term of art."[189] It is implicit in Harris v. Quine that a foreign judgment, dismissing an action on the ground that under its law the limitation period has run, is only a judgment "on the merits" if it extinguishes the plaintiff's right as well as his remedy.[190] In Black-Clawson, however, Lord Diplock (and arguably Lord Wilberforce also)[191] defined a judgment "on the merits" so as to "exclude judgments given upon the ground of non-compliance with a procedural rule of the foreign court

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188 (1869) L.R. 4 Q.B. 653.

189 Black-Clawson International Ltd. v. Papierwerke Waldhoff-Aschaffenburg A.G. [1975] A.C. 591, 635.

190 See also Black-Clawson International Ltd. v. Papierwerke Waldhoff-Aschaffenburg A.G. [1975] A.C. 591, 626, per Viscount Dilhorne.

191 Ibid., p.632.

or upon some other ground which would be classified in English private international law as governed by the lex fori".[192] As we have indicated above,[193] we find the test of whether it is the plaintiff's right or his remedy which is affected by a statute of limitation a doubtful criterion by which to determine whether the statute is substantive or procedural for choice of law purposes. Accordingly we prefer Lord Diplock's interpretation of the phrase "judgment on the merits". If the recommendation which we make in Part VI above is accepted and statutes of limitation are to be classified as substantive for choice of law purposes in proceedings before the English courts, then, on the assumption that Lord Diplock's interpretation of the expression "on the merits" is correct, it would follow as a matter of course that a foreign judgment on a limitation point would be treated by the English courts as a judgment "on the merits" and entitled to recognition as such. However, if the expression "judgment on the merits" were to be defined in the same way as it appears to have been in Harris v. Quine we anticipate that conceptual difficulties might still arise in the Black-Clawson type of situation where the foreign court regards the plaintiff's theoretical right as still surviving the judgment. This raises the question whether, for the avoidance of doubt, any legislation implementing the changes which we propose in Part VI ought specifically to state that a foreign judgment on a limitation point should be regarded by the English courts as a judgment "on the merits" giving rise to an estoppel per rem judicatam. On balance we think this should be made clear by statute, but would welcome comments.

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192 Ibid., p.635. To a certain extent, this has the same practical effect as the definition offered in Harris v. Quine under the law as it now stands.

193 See paras.14 and 32, above.

71. We feel that one further point might be made in the present context. In Part VI[194] we recommended that where an English court applies a foreign lex causae it should apply the statute of limitation of the lex causae irrespective of its classification under the foreign law. For the same reasons we think that a foreign judgment on a limitation point should be entitled to recognition in this country on the principles outlined above, regardless of whether under the law of that foreign country the statute of limitation applied was regarded as substantive or procedural. At first sight this proposal might appear to be susceptible to the same criticism as that which we advanced against the decision of the House of Lords in the Black-Clawson case,[195] namely that it ignores the express classification afforded by the country of the lex causae. On closer examination, however, we do not think that is so.[196] The effect of the English court ignoring the substantive classification of the German statute of limitation in the Black-Clawson case was to allow the plaintiff to do something which he could no longer do in Germany. However, where a German court has given judgment on the basis of a limitation provision which they regard as procedural, we do not think that this particular criticism would apply because in recognising the German court's judgment, an English court would be allowing the plaintiff no more nor less than he had already obtained in the courts of the lex causae. In fact to permit an English court to do otherwise would be to create a complete anomaly in view of our main proposal that an English court must apply the period prescribed by the lex causae.[197]

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194 See para.56, above.

195 See para.68 and n.187, above.

196 See also para.42, above which deals with the different, but related situation where an English court applies a foreign statute of limitation which is classified as procedural by the law to which it belongs.

197 The observations made in this paragraph are, of course, subject to the proviso mentioned in paras.35 and 56(b)(i) above, to the effect that the English courts will give the foreign statute of limitation the same effect, as a rule of prescription or limitation, as it would have had under the lex causae.

(F) The influence of E.E.C.

72. For the sake of completeness, it ought perhaps to be mentioned that the decision in a case such as Black-Clawson may, for the future, be affected by the 1968 E.E.C. Convention on jurisdiction and enforcement of judgments in civil and commercial matters, as amended by the 1978 Convention of Accession thereto by the three new Member States of the E.E.C.[198] These Conventions, when implemented in the United Kingdom, will provide for the recognition and enforcement here of judgments of courts of the other Member States of the E.E.C. in a very wide range of civil and commercial matters. There is no express restriction on recognition on the ground that the foreign judgment was not "on the merits". Indeed, the relevant Article of the Convention, Article 26, is unqualified in its language: "A judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required." Although Article 27 does provide a number of grounds of non-recognition, including such matters as recognition being contrary to public policy or, in the case of default judgments, that the defendant was not duly served, there is no specific ground for denial of recognition on the basis that the foreign judgment was not given "on the merits." However if one turns to the two Reports on the 1968 and 1978 Conventions it appears that denial of recognition to a judgment obtained in another Member State might be permitted on the ground that it had been given on a purely procedural ground. The Report on the 1968 Convention (the Jenard Report) suggests that a foreign judgment must be given the effect accorded to it in the country where it was given without qualification as to its being "on the merits",[199] but a

198 For the text of these Conventions, see (1978), Cmnd. 7395; Official Journal of the European Communities, No. L 304 (30 October 1978).

199 See Official Journal of the European Communities No. C 59 (5 March 1979) p.59/43.

rather more cautious approach as to the effect of Article 26 is taken in the Report on the Convention as amended (the Schlosser Report). It is there suggested that Article 26 must be qualified to the extent that "German decisions on procedural matters are not binding, as to the substance, in England. An English court may at any time allow (or, for substantive reasons, disallow) an action, if proceedings are started in England after such a decision has been given by a German court."[200] This approach goes a considerable way to support the principle that a foreign judgment on a purely procedural matter is not to be recognised here. It leaves open however the question of what matters are to be regarded as procedural and it may well be the case that, if that issue were to be the subject of a decision by the European Court of Justice, a decision on a limitation point would not be regarded as procedural.[201]

Contribution

(A) The present law

73. We think that it might be helpful to give a general indication of the present law of contribution as it affects the law of limitation before we consider the impact in this area of the provisional recommendations in Part VI of this working paper. The inter-relation of the rules governing contribution between joint wrongdoers and the law of limitation of actions is a topic which we considered in our Report on Contribution.[202] One particular problem with which we were concerned was this.[203] If P has recovered damages

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200 Ibid., at p.59/128.

201 Bearing in mind that most other Member States regard questions of limitation as questions of substantive law; and see also the draft E.E.C. Convention on the law applicable to contractual obligations, Article 10(1)(d) discussed above, para.23.

202 Law Com. No. 79 (1977).

203 Ibid., paras.24-25, 60.

from D_1, should D_1's right to contribution from D_2 be affected by the fact that P could no longer sue D_2 because of the expiry of the relevant limitation period? It was the rule under the Law Reform (Married Women and Tortfeasors) Act 1935[204] that D_1 could recover in the situation just given and D_2 could not shelter behind the Limitation Act 1939.[205] However, if P had in fact sued D_2 and the court had held that the claim was statute-barred, D_1 could recover no contribution.[206] We recommended that the law should be altered so that when D_1 sued D_2 for contribution, D_2's liability should be the same whether he had been sued by P and won on a 'limitation' point or had never been sued at all.[207]

74. This recommendation was substantially implemented by section 1(3) of the Civil Liability (Contribution) Act 1978.[208] The effect of this subsection is that D_1 can recover contribution from D_2 even if D_2 has defeated a claim by P on a 'limitation' point. However, D_2 can resist a contribution claim if the expiry of a period of limitation or prescription has the effect of extinguishing P's right of action against D_2, rather than just barring his remedy. The effect of the Limitation Act 1939 is usually to bar the remedy and not extinguish the right, but such extinction of the right of action does occur under sections 3 and 16 of the 1939 Act and such is also the effect, as we have seen, of many foreign statutes of limitation.

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204 Sect.6(1)(c).

205 See Geo. Wimpey & Co. Ltd. v. B.O.A.C. [1955] A.C. 169, 190; Harvey v. R.G. O'Dell Ltd. [1958] 2 Q.B. 78, 108-110.

206 Geo. Wimpey & Co. Ltd. v. B.O.A.C. [1955] A.C. 169.

207 Law Com. No. 79 (1977) para.60.

208 "A person shall be liable to make contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, unless he ceased to be liable by virtue of the expiry of a period of limitation or prescription which extinguished the right on which the claim against him in respect of the damage was based."

75. Foreign limitation provisions may be of significance in the context of this working paper not only because our provisional recommendations could lead to their being applied by our courts much more frequently but also because of the implications of our recommendations on the law relating to foreign judgments.[209] It is therefore necessary to examine together the effects of our recommendations on both the law of contribution and of recognition of foreign judgments. Accordingly we now consider the extent to which the Civil Liability (Contribution) Act 1978 applies to contribution claims involving foreign elements.

76. First, it should be borne in mind that the 1978 Act will only apply to those claims for contribution involving rules of private international law where the law governing the contribution claim (as opposed to P's right of action) is English law. There is no direct English authority on the law to govern a contribution claim but the better view would seem to be that it is a matter to be governed by the proper law of the obligation.[210]

77. If the contribution claim is governed by the 1978 Act, liability under that Act to make contribution requires the liability of D_1 and D_2 to be such that it has been, or could be, established by an action in England and Wales, taking into account rules of private international law.[211] If, therefore, D_1 alleges that D_2 is liable to P for breach of contract under French law, though not under English law, D_2 will be regarded as liable if the English courts held or would have held French law to be the proper law of the contract.

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209 Discussed above, paras.64-72.

210 Dicey and Morris, Conflict of Laws, 9th ed., (1973), p.967; Cheshire and North, Private International Law, 10th ed., (1979), p.282.

211 s.1(6).

78. Furthermore, section 1(5) of the 1978 Act is also relevant. It provides that a judgment of any United Kingdom court in an action brought by P against D_2 shall be conclusive, in contribution proceedings brought by D_1 against D_2, of any issue determined by the judgment in favour of D_2. This provision is more significant in the present context for what it does not cover than for what it does. If the action by P against D_2 fails by reason of a 'limitation' point, section 1(5) provides no protection to D_2 against D_1's claim for contribution. This is because there is no decision on the substance of P's claim, merely that it is statute-barred (unless the right of action is extinguished by the lapse of time).[212] However, the issue estoppel created by section 1(5) applies only to judgments given in United Kingdom courts. It makes no special provision for the effect of a foreign judgment in favour of D_2 on D_1's claim to contribution.

(B) Effect of our provisional recommendations

79. Let us now turn to the impact on the inter-relation of the law of contribution and of limitation which may stem from our provisional recommendations. We think that there are two particular problems in this field which we must consider. They are:

(i) The effect of the reclassification of limitation provisions on section 1(3) of the Civil Liability (Contribution) Act 1978.

(ii) The effect of any changes in the law of foreign judgments, stemming from reclassification, on the law of contribution.

We look at both problems in turn.

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212 There is no express reference to limitation in s.1(5) but it seems clear from the analogy of s.1(3) that a decision on a limitation point where only the remedy is barred is not a conclusive judgment on such an issue as falls within s.1(5).

(i) Effect on section 1(3) of the 1978 Act

80. Provided that no change is made in the effect rather than the classification of limitation, i.e., in the general rule that limitation affects only the remedy,[213] we do not think that reclassification will have any impact on the operation of section 1(3) of the Civil Liability (Contribution) Act 1978. If English law is the lex causae, the expiry of a limitation (as opposed to a prescriptive) period only bars the remedy so the fact that D_2 is not, on that account, liable to P will not relieve him of liability to contribute to D_1. We must, however, consider whether the position will be different where foreign law is the lex causae[214] and the statute of limitation of that legal system is applied by the English court as a matter of substantive law. We have indicated earlier[215] that where a foreign rule as to limitation is applied by the English courts it should be given the same effect as to barring the remedy or extinguishing the obligation as it has in that law. That being so, there should be no problem in applying a foreign limitation provision in the context of section 1(3). It will have no effect on D_1's right to claim contribution from D_2 unless, under the foreign law, it extinguishes P's right of action against D_2.

(ii) Effect of changes in law on foreign judgments

81. The second problem to be considered is the combined effect of the provisional recommendations which we made in Part VI above coupled with their implications in the law of

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213 See paras.35 and 56(b)(i), above.

214 There would appear to be no difficulty in applying a foreign law of limitation in determining D_2's liability to P (and thus to D_1) because, as we have seen in para.77, above, liability must be established under the law of England and Wales but including rules of private international law: 1978 Act, s.1(6).

215 See paras.35 and 56(b)(i), above.

recognition of foreign judgments which we described in paragraphs 66 to 72 above on the law of contribution. We have suggested earlier[216] that a foreign judgment in favour of a defendant on a limitation point should be a judgment "on the merits" and should therefore estop the plaintiff from bringing a claim based on the same cause of action in England. It should, however, have no more effect than a similar English judgment. So if the effect of the foreign judgment is that only the remedy is barred, it ought not to be possible for a defendant to rely on it in England if the plaintiff can find a method other than by action by which to uphold his claim.[217] We have seen that a judgment of a United Kingdom court in favour of D_2 on a limitation point (i.e., where only the remedy is barred) will not provide any protection to D_2 when sued for contribution by D_1. In our view, a foreign judgment on a 'limitation' point recognised under the general law ought to have a similar effect. Under our proposals, the judgment would be regarded as being "on the merits" and thus entitled to recognition here although it should have no greater effect than a similar English judgment. Section 1(5) creates no issue estoppel for English judgments where only the remedy is barred; nor in our view should a foreign judgment with a similar effect.

82. The position is rather different with a foreign judgment on a statute of limitation whose effect is to extinguish the plaintiff's right of action. Whilst there is no authority on whether such a judgment will be recognised and enforced in England, we believe that it would, even under the present law, be regarded as a judgment "on the merits" and, as such, be fully entitled to recognition. If that is the case, then section 1(5) of the 1978 Act already creates an anomaly which is merely highlighted by our proposals.

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216 See para.70, above.

217 See para.35, above.

If the effect of a judgment of a United Kingdom court in favour of D_2 is that the expiry of the limitation period extinguishes the right,[218] then the effect of section 1(5) is that D_2 can rely on that judgment as conclusive of his non-liability when sued by D_1 for contribution. However the position is different in the case of a similar judgment of a foreign court outside the United Kingdom. Assuming that the effect of the judgment in favour of D_2 is that P's right of action has been extinguished by the lapse of time, the effect of this judgment in England will be to give rise to an estoppel preventing P from suing D_2 again in this country. However, the judgment will have no effect under the 1978 Act on D_1's right to contribution from D_2. This is because it is not a judgment of a United Kingdom court and is thus not given conclusive effect in favour of D_2 by section 1(5) of the 1978 Act. This anomaly exists under the present law and would be unaffected by our proposal that foreign judgments should also be recognised as being judgments "on the merits" where only the remedy is barred.

(C) Conclusion

83. Our provisional conclusion is that our main recommendation[219] will have no implications for the law of contribution which necessitate any changes in the Civil Liability (Contribution) Act 1978, or elsewhere in the law of contribution. In the paragraphs above we have drawn attention to the fact that anomalies already exist in relation to that Act.[220] However we believe that these will become

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218 E.g., under the Limitation Act 1939, s.3 and the Prescription and Limitation (Scotland) Act 1973, s.6.

219 See para.56, above.

220 In addition to the anomaly as to the scope of s.1(5) of the 1978 Act discussed in para.82, above. That particular anomaly was introduced during the passage through Parliament of the Bill which became the 1978 Act. As originally introduced, s.1(5) would have applied also to all foreign judgments which were regarded in England as conclusive "as to the issue in question."

even more apparent if our provisional proposals regarding the classification of limitation are implemented. For instance:

(a) Our main recommendation is that limitation provisions should be classed as substantive with the corollary that a foreign judgment on a limitation point should in future be regarded as a judgment "on the merits". The effect of section 1(5) of the 1978 Act is that a judgment on a limitation point where only the remedy is barred is not a judgment which is conclusive "as to any issue determined" thereby. It is for consideration whether section 1(5) ought to be widened to give conclusive effect to such a judgment, given that limitation provisions are henceforth to be regarded as matters of substance.

(b) It might similarly be asked whether the policy of section 1(3) of the 1978 Act can be maintained. Whilst we have no doubt that the effect of the lapse of time on D_1's right to contribution from D_2 should not depend on whether or not D_2 has actually been sued by P, it might be thought that section 1(3) should be re-examined if all limitation provisions are to be regarded as matters of substance. This could involve a substantial reversal of the rule in section 1(3) so that a claim for contribution would be lost whenever P's claim against D_2 was time-barred whether the remedy was barred or the right extinguished. If such a change is not made, an English court may find itself giving effect to a foreign rule as to limitation, either by applying it as the lex causae, or by recognising a foreign

judgment based thereon, for all purposes except contribution proceedings.

These are matters falling outside our terms of reference and on which we express no provisional views. We would welcome comments on these issues and on the other aspects of the impact of our proposals on the law of contribution.

Procedure and practice in the English courts

84. We have considered whether the changes which we propose in the classification of statutes of limitation for choice of law purposes might create difficulties in the procedure or practice of the English courts. Our tentative conclusion is that they would not.

85. In the first place, our proposals will have no effect upon the principal procedural feature of statutes of limitation in this country, namely that a party to an action must specifically plead the appropriate time bar if he wishes to avail himself of the defence which it provides. Order 18, rule 8,[221] of the Rules of the Supreme Court, which embodies this rule, refers to "any relevant statute of limitation", and is therefore couched in terms wide enough

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221 This provides:

"(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality -

(a) which he alleges makes any claim or defence of the opposite party not maintainable, or
(b) which, if not specifically pleaded, might take the opposite party by surprise; or
(c) which raises issues of fact not arising out of the preceding pleading."

to require that a statute of limitation, applicable under our proposals as a part of the lex causae, be expressly pleaded. It is also a requirement that where a person wishes to rely on foreign law he must specifically plead it. Accordingly a party seeking to rely on a foreign statute of limitation under our proposals will still be required specifically to plead it in an action before an English court.

86. Secondly, as we have indicated in paragraph 57 above, English courts are bound to apply the limitation provisions of a foreign lex causae where they are substantive in effect.[222] The Rules of the Supreme Court are therefore already drafted so as to permit the consideration of foreign, as well as English, statutes of limitation in appropriate cases,[223] and this does not cause difficulty. We therefore have no reason to believe that any significant problem would be created by the wider reference to foreign statutes of limitation which our proposals will entail.

87. Finally, we would point out that there are already many occasions where an English court applies its own rules of procedure in dealing with matters which are, as to substance, governed by foreign law. For instance Order 18, rule 8, referred to in paragraph 86 above, requires that not only matters of limitation but also those of "performance, release ..., fraud or any fact showing illegality" should be specifically pleaded by a party seeking to rely on them. This rule applies even where the issues just mentioned are governed by foreign law. The combination of English rules of procedure and foreign rules of substance does not seem to cause

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222 See also paras. 8 and 9, above.

223 E.g. O.20, r.5; O.15, r.6, on which see Marubeni Corporation and Another v. Pearlstone Shipping Corp., The Times, June 30 1977.

difficulty in relation to matters already classified as substantive, and we have no reason to believe that it would do so if statutes of limitation were also to be classified as substantive.

88. We are conscious that there may be procedural implications of our provisional recommendations which we have not identified. We would particularly welcome comments both on the procedural matters referred to in the preceding paragraphs and on any other implications which our recommendations may be thought to have.

PART VIII: SUMMARY OF PROVISIONAL RECOMMENDATIONS

89. We now set out a summary of the provisional recommendations made in this working paper. We would welcome comments on all their aspects, and in particular on their commercial and practical implications. They are as follows:

(a) All statutes of limitation, whether English or foreign, and whether classified as substantive or procedural by a foreign court, should be classified as substantive in this country for choice of law purposes. (paragraph 56)

(b) This recommendation should be subject to two provisos, namely that:

(i) the effect given by the English courts to the expiry of a period of limitation or prescription applicable under the law of a foreign country should be the same as would have been given by the courts of that foreign country;

(ii) there should be no change in the discretion of the English courts in matters of public policy. (paragraph 56)

(c) In applying a foreign statute of limitation the English courts should have regard to the whole body of the domestic law of the *lex causae*, and in particular to any provisions which might operate to suspend the running of the appropriate period, but

subject to the proviso mentioned in sub-paragraph (d) below.
(paragraph 61)

(d) Where the period of limitation adopted by the lex causae is suspended by reason of either party's absence from the jurisdiction, the English court should apply the period of limitation adopted by the lex causae without regard to the suspensive provision. (paragraph 63)

(e) For the avoidance of doubt, it should be expressly provided by statute that a foreign judgment on a limitation point should be regarded by the English courts as a judgment "on the merits" giving rise to an estoppel per rem judicatam.
(paragraph 70)

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